83-804

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, *et al.*,
Petitioners

v.

ISHMAEL JAFFREE, *et al.*,
Respondents

DOUGLAS T. SMITH, *et al.*,
Plaintiffs-Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT C. CAMPBELL, III
Counsel of Record
ROBERT H. MUDD, JR.
MARY BETH MANTIPLY
Members of the Bar of the
Supreme Court of Alabama
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, Alabama 36609
Telephone: (205) 344-7241

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QUESTIONS PRESENTED

I. Whether the Judgment of the United States Court of Appeals for the Eleventh Circuit, which overturned the Judgment of the United States District Court for the Southern District of Alabama should be reversed and the Judgment of the District Court should be reinstated?

II. Whether events prior to the adoption of the First Amendment prove that it does not prohibit the defendant school teachers from permitting voluntary prayer in the classroom?

III. Whether the Fourteenth Amendment incorporates the Establishment Clause of the First Amendment against the states thereby prohibiting the defendant teachers from permitting voluntary prayer in the classroom?

IV. Whether voluntary prayer in the classroom violates the Establishment Clause?

LIST OF ALL PARTIES

A. Petitioners:

The Appellees/Defendants below:

THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY; DAN C. ALEXANDER, DR. NORMAN BERGER, HIRAM BOSARGE, NORMAN G. COX, RUTH F. DRAGO and DR. ROBERT GILLIARD, in their official capacities as members of the Board of School Commissioners of Mobile County; DR. ABE L. HAMMONS, in his official capacity as Superintendent of the Board of Education of Mobile County; ANNIE BELL PHILLIPS, individually and in her official capacity as principal of MORNINGSIDE ELEMENTARY SCHOOL; JULIA GREEN, individually and in her official capacity as a teacher at MORNINGSIDE ELEMENTARY SCHOOL; BETTY LEE, individually and in her official capacity as principal of E. R. DICKSON ELEMENTARY SCHOOL; CHARLENE BOYD, individually and in her official capacity as principal of E. R. DICKSON ELEMENTARY SCHOOL; EMMA REED, individually and in her official capacity as principal of CRAIGHEAD ELEMENTARY SCHOOL; PIXIE ALEXANDER, individually and in her official capacity as a teacher at CRAIGHEAD ELEMENTARY SCHOOL.

B. Respondents:

The Appellants/Plaintiffs below:

ISHMAEL JAFFREE; JAMAEL AAKKI JAFFREE, MAKEBA GREEN, and CHIOKE SALEEM JAFFREE, infants, by and through their best of friend and father ISHMAEL JAFFREE.

C. Intervenors:

DOUGLAS T. SMITH, *et al.*

Note: For a complete listing of the intervenors in the court below see Appendix F, p. 1f.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, 705 F.2d 1526 (1983), is attached as Appendix A.

The opinion of the Court of Appeals for the Eleventh Circuit, 713 F.2d 614 (1983), denying rehearing is attached as Appendix B.

The opinion of the U.S. District Court for the Southern District of Alabama, 554 F. Supp. 1104 (1982), is attached as Appendix D.

JURISDICTION

1. On May 12, 1983, the Court of Appeals for the Eleventh Circuit entered its judgment, attached as Appendix A, reversing the district court in this matter. The Court of Appeals, by order dated August 15, 1983, (attached as Exhibit B) denied the defendant Board of School Commissioners' Petition for Rehearing and Suggestion for Hearing En Banc.

2. The jurisdiction of this Court to review the judgment of the Court of Appeals, and to issue the Writ of Certiorari is invoked pursuant to 29 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

(Ratified July 9, 1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, ex-

cluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, [changed by section 1 of the twenty-sixth Amendment] and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability

Section 4. The validity of the Public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay the debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Ishmael Jaffree is a citizen of the United States, a resident of Mobile County, Alabama, and has three (3) minor children attending public schools in Mobile County, Alabama; Jamael Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree. (Hereinafter referred to as "Jaffree" or "Plaintiffs-Respondents.")

Defendants-Petitioners Annie Bell Phillips (principal) and Julia Green (teacher) are employed at Morningside Elementary School, where Jamael Aakki Jaffree attended school during the 1981-82 school year. Defendants-Petitioners Betty Lee (principal) and Charlene Boyd (teacher) are employed at E. R. Dickson Elementary School where Chioke Saleem Jaffree attended school during the 1981-82 school year. Defendants-Petitioners Emma Reed (principal) and Pixie Alexander (teacher) are employed at Craighead Elementary School where Makeba Green attended school during the 1981-82 school year. Each of these defendants is sued individually and in their official capacity. Each of the schools is part of the system of public education in Mobile County, Alabama.

Dan Alexander, Dr. Norman Berger, Hiram Bosarge, Norman Cox, Ruth F. Drago and Dr. Robert Gilliard are members of the Board of School Commissioners of Mobile County, Alabama. As commissioners, each of these defendants collectively is charged by the laws of the State of Alabama with administering the system of public instruction for Mobile County, Alabama. These defendants-petitioners are sued in their official capacity. (Hereinafter referred to as "Board" or "Board of School Commissioners.")

Dr. Abe L. Hammons is the Superintendent of Education for Mobile County, Alabama. Defendant-Petitioner Hammons has direct supervisory responsibilities over all principals, teachers and other employees of the Mobile County Public School System. This defendant is sued only in his official capacity.

Ishmael Jaffree, on behalf of his three (3) minor children, filed a lawsuit seeking compensatory and punitive damages against the named teacher defendants and their superiors including the named principals, named administrative staff and the Board of School Commissioners. In addition, Mr. Jaffree sought declaratory and injunctive relief. Specifically, he sought a declaration from the district court that certain prayer activities permitted by his children's public school teachers violated the establishment clause of the first amendment to the United States Constitution.

A trial was held on the merits on November 15 through 18, 1982. After hearing the testimony of witnesses, considering the exhibits, discovery, stipulations, pleadings, briefs and legal argument of the parties the court entered an order dismissing the plaintiffs' case with prejudice.

The evidence adduced at trial showed that the defendant Charlene Boyd, a black school teacher, permitted her class at E. R. Dickson School to sing the following phrase prior to eating meals:

> God is great, God is good,
> Let us thank Him for our food,
> Bow our heads we all are fed,
> Give us Lord our daily bread.
> Amen! R.447

Defendant Boyd was approached by the children during her first teaching year "Asking to thank God for their food." Tr. 122. There were no objections from any children with regard to the children who asked if they could thank God for their food. Id. The only objection received was from Mr. Jaffree, who approached defendant Boyd during March of 1982 towards the end of school. Tr. 123. Mr. Jaffree told Mrs. Boyd there were lawsuits all over the country and said Mrs. Boyd could go to jail for this type of activity. Tr. 124. Mrs. Boyd stated Mrs. Jaffree, a co-teacher at the same school, had no objections to the voluntary phrase being recited in her

child's classroom. Tr. 124-125. In fact, Mrs. Boyd stated Mrs. Jaffree said "she doesn't understand him [Mr. Jaffree] sometimes." Id.

Mrs. Boyd stated Mr. Jaffree's child, Chioke, willingly participated in the activity complained of, held the flag during the pledge of allegiance and sang patriotic songs such as "God bless America." Tr. 125-126.

Mrs. Boyd stated she did not recite the "God is Great . . ." phrase because of any state law, State Board of Education policy or local Board policy. Tr. 126. She stated she learned it when she was in the first grade in 1964. Id. She also said she felt it helped the children because "a lot of them came from broken homes and school was the only food they got at breakfast and lunch." Tr. 129.

Mrs. Boyd said that during one of her conferences Mr. Jaffree stated he couldn't do anything about his preschool children who were learning more religion in private school, although he himself chose to send his children to a private school where more religion was taught than in the public schools. Tr. 130. Mrs. Boyd testified she believes God creates food. Tr. 131. She said she thanks God for her blessings at home and thinks it's appropriate to thank God in a voluntary fashion for food while at school. Id.

Defendants-Petitioner Betty Lee, principal at E. R. Dickson School, testified she had never received instruction or directions from the administration regarding the establishment of religion (Tr. 174) and that she was not familiar with any state laws regarding school prayer. Tr. 175.

Mr. Jaffree sent a letter to the Superintendent shortly before school was closed for the summer, complaining about the prayer activity in Mrs. Boyd's classroom. R. 449. Mr. Jaffree sued the Mobile County School System one week prior to the students recessing for summer vacation.

Defendant Pixie Alexander, a white school teacher, has permitted her class at Craighead School to recite the following phrase:

"God is great, God is good,
Let us thank Him for our food." R.448

Further, Defendants-Petitioner Alexander has permitted her class to recite the Lord's Prayer. These phrases continued throughout the 1981-82 school year. R. 449.

Defendants-Petitioner Alexander learned on May 24, 1982 just before the close of school for the summer that Mr. Jaffree had complained about the above referenced prayer activity. Id. She stated during the trial of the case that she had not received any directives from the school administration to engage in this type of activity. Tr. 71. She stated Mr. Jaffree's child, Makeba, never complained to her about voluntarily participating in the voluntary chant. Tr. 74.

Mrs. Alexander stated she was not teaching religion, nor preferring one over another. Tr. 75-76. In fact she stated she would permit any student including Makeba to pray to Buddha or to engage in any other religious activity before lunch in a voluntary manner if requested by her or any other student. Tr. 76. In fact she said if she denied Makeba the opportunity to pray to Buddha she felt it would be a denial of Makeba's freedom to exercise free speech and religion. Tr. 77.

Defendants-Petitioner Julia Green, a black teacher, taught Jamael Aakki Jaffree during the 1981-82 school year at Morningside Elementary School. Tr. 176. She permitted the following grace to be voluntarily stated before going to lunch.

"For health and strength and daily food
We praise Thy name, oh Lord." Tr.177.

She stated this phrase was taken from a song book used by a Title I teacher who taught a majority of her students the year before. Tr. 177. She did not engage in any other prayer activity. Tr. 178.

When asked by the Plaintiffs-Respondents' attorney as to the purpose of saying grace, Mrs. Green responded that she had asked the students why they wanted to say grace and they responded "My mother teaches me this at home, and we want to do it at school." Tr. 180. When asked about her own religious beliefs she stated, "My religion says, it says to me to pray without ceasing, be thankful for the food that you receive." Id. The first time Mrs. Green was aware of Mr. Jaffree's complaints was May 11, 1982 (Tr. 181), eight and one-half months into the school year, shortly before school was recessed for summer vaction. Mr. Jaffree had many opportunities to object since Mrs. Green had many conferences with him from the first week of September throughout the year. Tr. 187-188.

After receiving the complaint Mrs. Green became so upset she missed two days of school. Tr. 184. When she returned she did not let the children say grace. The children became upset so she allowed them to say grace to themselves. Id. When she did not initiate grace she watched all of the children, including Aakki Jaffree, bow their heads and say a little prayer. Tr. 185.

Mrs. Green testified she felt prayer was part of the children's everyday life. Tr. 191. She prayed as a child. Tr. 192. She has been teaching for 25 years. Id. She was a graduate in 1951 from an historically black high school in the Mobile County School System where she prayed. Tr. 194. She learned "God is good, God is great" in the first grade at Owens School in Mobile. Tr. 195. The chant was voluntarily permitted in the Mobile County School System back in 1941 or 1942 when Mrs. Green was a first grade student. Id. She has not learned of an objection posed since 1943 concerning this prayer except the complaint filed by Mr. Jaffree. Id.

Mrs. Green testified Mr. Jaffree's child enjoyed singing patriotic songs such as "God Bless America" with the apparent knowledge of his father. Tr. 196. In fact,

when he sang "God bless America", Mr. Jaffree's son was "in his glory" according to his teacher. Tr. 197. It was obvious from the testimony that Mr. Jaffree's child loved his teacher. He hugged her every day. Id.

Like the other teachers, Mrs. Green had not been given instructions by the administration to allow voluntary prayer in the classroom. Tr. 200, 201. She was not directed by the Board of School Commissioners. Id. She was not participating in the activity because of a state law. Tr. 201. She felt it would be a violation of her free exercise of religion to turn her religious beliefs away when going to work. Tr. 203, 204. Mrs. Green taught Mr. Jaffree's son in a basic skill program which she stated became directly involved with value systems. Tr. 205. As an educator, she did not feel it appropriate to exclude the fact that this country was created under God. She said "I think this is the only thing keeping us together in the school system." Id.

Mr. Jaffree never objected to Mrs. Green's basic skills curriculum and in fact requested that his son be placed in her class again during the 1982-83 school year. Tr. 205.

The Board policy on religious activity is neutral on its face. R. 450.

The plaintiffs failed to show the teachers were instructed by the Board, the Superintendent of their respective principals regarding voluntary prayer activities. The teachers were acting on their own volition without state directives. Plaintiffs failed to prove that any of the teachers were aware of the Ala. Code § 16-1-20.1 (Supp. 1982) which provides for silent meditation or voluntary prayer before the beginning of the classroom day or that they were reciting the prayer contained in Senate Bill 8, 1982 Alabama Acts, No. 82-735 (hereinafter "Fob James prayer"). It was undisputed that prior to the filing of the plaintiffs' lawsuit the teachers were not acting under the authority of either a state statute or board policy.

After the trial concluded, post-trial briefs were referred to Judge Hand on January 10, 1983. On January 14, 1983 the district court entered its order and opinion finding Plaintiffs-Respondents were not entitled to recover and dismissing the case with prejudice. R. 443-512.

The Plaintiffs-Respondents filed motions on January 17, 1983 to alter the judgment, waive bond, and for a stay and injunction pending appeal (R. 513-521) all of which were denied by the Court at a hearing in chambers. R. 523.

The Plaintiffs-Respondents filed a notice of appeal as to both cases, that is Case #82-0792-H, which was the suit against the officials of the State of Alabama concerning the "Fob James prayer," and Case #82-0554-H, which is the suit against the Board of School Commissioners for remaining neutral on the issue of voluntary prayer. R. 522.

On January 20, 1983 the Eleventh Circuit denied emergency motions filed by the Plaintiffs-Respondents. The Eleventh Circuit ruled for the Plaintiffs-Respondents on their motion to consolidate Case #82-0792-H (Alabama State Officials) and Case #82-0554-H (Board of School Commissioners) for purposes of the appeal.

On February 2, 1983 Honorable Lewis F. Powell, Associate Justice of the Supreme Court of the United States entered an order, pending receipt of responses from the defendants, staying the judgments of the United States District Court dismissing the Plaintiffs' actions. After receiving the Defendants' responses Justice Powell continued the stays of the United States District Court's judgments dismissing the Plaintiffs' actions pending final disposition by the Eleventh Circuit.

On May 12, 1983 the United States Court of Appeals issued its opinion reversing the judgment of the district court and remanding this case with instructions for the district court to award costs to the Appellant (Plaintiffs-

Respondents) and to issue and enforce an order enjoining the statutes and *activities* held to be unconstitutional. (emphasis added)

(Appendix A, p. 20).

On Petition for Rehearing to the Court of Appeals, a majority of the Circuit Judges in regular active service did not vote in favor of rehearing, or for rehearing En Banc, and both motions were denied.

(Appendix B, pp. 1-4).

The Honorable W. Brevard Hand, Chief Judge of the United States District Court for the Southern District of Alabama, Southern Division on October 14, 1983, issued an injunction as directed by the mandate of the Eleventh Circuit.

(Appendix D, pp. 56, 57).

Thereafter, your Petitioner files this Petition for Writ of Certiorari to the Honorable United States Supreme Court.

Basis of Federal Jurisdiction in the United States District Court for the Southern District of Alabama.

The jurisdiction of the original lawsuit in the District Court was evoked by the Plaintiffs "pursuant to Title 28, Sections 1343(3) and (4) and Sections 2201 and 2202 of the United States Code." (Complaint of Plaintiff)

The Court noted that proper subject matter jurisdiction was based on the general, federal-question jurisdictional statute, 28 U.S.C. § 1331, and proceeded accordingly.

(Appendix D, pp. 8, 9).

Basis of Jurisdiction Before the United States Court of Appeals for the Eleventh Circuit.

The appeal to the Eleventh Circuit Court of Appeals was from a final judgment of the District Court for the Southern District of Alabama. The Eleventh Circuit had jurisdiction of the appeal under 29 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

Introduction

The judgment of the district court dismissing the plaintiffs' complaints after a trial on the merits should be reinstated. The district court's findings of facts and conclusions of law were based on an exhaustive analysis of the historical background of the first and fourteenth amendments in conjunction with its thorough examination of relevant case law and evidence presented at trial.

The Plaintiffs-Respondents in this case rested their entire legal argument on *stare decisis*. Little reference was made in the Plaintiffs-Respondents' brief to the Eleventh Circuit concerning the facts of this case. The cases cited by the plaintiffs were not analogous to the facts of the Board of School Commissioners' case. Without exception the authorities cited by the Plaintiffs-Respondents considering the question of school prayer in the public schools are based on the Court's interpretation of state laws and/or school board policies encouraging prayer.

The teachers sued in this case were not directed by state law or board policy to conduct prayer activity in the school. The board policy was neutral. The teachers were not aware of any state laws dealing with the issue of prayer. The teachers and their students were exercising matters of personal conscience. The voluntary recital of prayer before lunch by teachers and students in Mobile resulted from their belief that those who wish to say prayer may say it whether it be at home or at school.

The distirct court heard the evidence and carefully examined the intent of the framers of the first and fourteenth amendments to the Constitution. An exhaustive amount of scholarly expert evidence was submitted by the Defendants-Petitioners and Defendant-Intervenors.

After hearing from constitutional and religious scholars and literally poring through a mass of historical documentation, scholarly articles, books, journals and voluminous treatises introduced by the Defendants-Petitioners, the district court correctly concluded that the first amendment establishment clause does not prohibit prayer in the schools.

Although the district court was faced with a direct challenge to settled precedent upon which the Plaintiffs-Respondents relied, the district court held that the precedent set by the Court since 1947 resulted from an incorrect analysis of the Constitution. The Defendants-Petitioners agreed with the district court that too much discussion of constitutional law was centered on the Court's decisions without enough regard for the text and history of the Constitution itself.

The evidence presented by the Defendants-Petitioners was based on a thorough look at the Constitution. The relevant legislative history surrounding the adoption of both the first and fourteenth amendments, together with the rather clear language of both amendments led to the inescapable conclusion that the drafters did not intend to forbid voluntary prayer in the public school classrooms.

In the past, the opinions of the Supreme Court have silenced voluntary prayer of teachers and students for twenty years without solid legal justification. The district court conducted a correct legal analysis of the issues in question. This petition for certiorari gives this Honorable Court a chance to correct its previous rulings wherein the Court assumed powers which were not given to it by the Constitution. By affirming and reinstating the district court's decision we can once again look forward to freedom of speech and religion, two unalienable rights.

I.

WHETHER THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, WHICH OVERTURNED THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SHOULD BE REVERSED AND THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REINSTATED?

In briefs filed with the United States Court of Appeals for the Eleventh Circuit, the Plaintiffs-Respondents placed very little emphasis on the record of the proceedings at the trial of this matter held by the United States District Court, Honorable W. Brevard Hand presiding. The Plaintiffs-Respondents' attorney did not designate the entire record below, and did not refer to the record in briefs filed with the Eleventh Circuit.

The reason for this is clear—this is an unusual case and none of the authorities cited by the Plaintiffs-Respondents address a fact situation at all similar to the present case.

It is important to note that the briefs filed by the Plaintiffs-Respondents with the Eleventh Circuit discuss forty years of Supreme Court precedent dealing with the question of prayer in public schools. However, each of these cases are easily distinguishable from the present case in that each and every one of these cases involve state statutes and/or local school board policies directing or allowing students to participate in prayer activities. As pointed out in the Statement of the Case, Section G, of this brief, the Plaintiffs-Respondents failed to show any proof during the trial before the district court that the Defendants-Petitioners had any affirmative policy dealing with religion in the schools. In fact, the Defendants-Petitioners brought forth affirmative proof to show that the religious activities in which the teachers and students were engaged were purely voluntary with

no directives, for or against, from the State of Alabama or the Board of School Commissioners.

The Plaintiffs-Respondents convinced the Eleventh Circuit that the neutral policies of the Board were unconstitutional by citing authority which the Defendants-Petitioners assert to be inapposite. The first of these is *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed2d 601 (1962), wherein the Court considered a directive from the local school board, *pursuant to a state law*, to the school district's principal, "to cause the following prayer to be said aloud by each class. . . ." 8 L.Ed.2d at p. 603. (emphasis added) The Court further stated, "There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in The Regents' prayer." Id. at p. 601.

The Supreme Court in *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 88 S.Ct. 1560, 10 L.Ed.2d 844, (1963) considered a Pennsylvania *law* requiring 10 Bible verses be read daily at the start of each school day. The Court further stated that the test of whether the establishment clause had been violated was what are the purposes and the primary effect of the *enactment* of the law. 10 L.Ed 2d at p. 858.

In *Stone v. Graham*, 449 U.S. 39 (1980), the Court considered a Kentucky *statute requiring* the posting of a copy of the Ten Commandments on the wall of each school classroom.

Plaintiffs-Respondents make much use of the so-called tripartite test announced in *Lemon v. Kurtzman*, 483 U.S. 602 (1971), yet this case also involved a state statute. In all of the plaintiffs' cited cases the court was presented with religious activity generated by state enactments.

What if a school teacher, acting on her own volition without any state authority or board directive decides that she must verbally pray to her God to fulfill the dic-

tates of her religion? What if a teacher decides to allow students and herself to verbally pray at school prior to going to lunch because her religion and her students' religion demand it? If we are ever going to get past the "establishment clause" to examine the "free exercise clause" we must answer that question. If no court addresses this question then obviously the "free exercise clause" as interpreted by the "modern" Court cases abridges an individual's freedom of religion. Surely if one has a right to speak, one has a right to pray, whether it be at home or at work.

For over twenty years teachers and students in the United States have been denied an equal, natural and unalienable right to free exercise of religion according to the dictates of their consciences. The type of individual activity presented in this case involves a civil liberty and not the establishment of religion. To deny a child voluntary prayer while at school from 7:30 a.m. until he leaves at 4:00 p.m. is stripping him of his religious freedom. To deny a teacher the opportunity to voluntarily pray before going to lunch whether it be silent or verbal prayer is violating his or her constitutional rights under the free exercise clause.

None of the plaintiffs' cited cases speak to the free exercise clause because each decision rests on a misinterpretation of the establishment clause. Certainly the Constitution gives teachers the right to encourage morality among the younger generation in the public schools. This is exactly what the Mobile teachers were doing in this case. To discourage this right is to deny freedom itself.

As far as this writer knows, prior to this lawsuit no parent, teacher or student has ever complained about individually initiated voluntary prayer activity in the Mobile County School System since its creation in 1826. Approxmately 620 people intervened in the lawsuit to support the named teacher defendants. There are 65,000 students enrolled in the Mobile County School System

with approximately 3,100 school teachers employed. To halt the desires of all these people for Mr. Jaffree does not seem at all proper. In fact it's simply unfair and incorrect.

The Defendants-Petitioners feel it's imperative that this Court look to the record of the trial before the district court. The following account should be helpful to this Court in distinguishing the facts of this case from the other "modern day prayer cases."

The Plaintiffs-Respondents, Ishmael Jaffree, et al never complained to the Board or to the Superintendent of schools concerning the activities taking place in his children's classrooms until just before the end of the school year. Before an investigation could be made he filed a lawsuit against the Defendants-Petitioners one week before the students recessed for the summer.

Mr. Jaffree originally complained to the teachers. It was obvious that he recognized the activity in question was initiated by the individual teachers in separate schools and separate grades. The Plaintiffs-Respondents produced no evidence at trial that the Board of School Commissioners of Mobile County enacted a procedure or policy encouraging or respecting the establishment of a religion in the classroom. Much to the contrary, the evidence showed that the Board remained neutral in respect to voluntary prayer in the classroom. The Plaintiffs-Respondents produced no testimony regarding Board action either directly or indirectly causing or affecting the activity complained of by the Plaintiffs-Respondents in their complaint. The evidence clearly showed that the three teachers, individually, and without any directions whatsoever from the administration, voluntarily thanked, and permitted the students to voluntarily thank God for their food prior to consuming it. The only connection between the teacher and the Board that Plaintiffs-Respondents offered at trial was a statement made at the Board table during a Board meeting *after* the

teachers were sued for $115,000.00 by Mr. Jaffree. The Board chose to defend the teachers in a lawsuit and nothing more. The Board did not advocate prayer nor amend its existing, neutral policies. It simply, upon advice of counsel, maintained the status quo until the litigation was finalized, in order to protect the interests of the teachers sued by Mr. Jaffree.

Plaintiffs-Respondents would like this Court to believe the named teachers were directed either by state law or board policy to conduct prayer activity in the school. This is absolutely false testimony on the part of the plaintiffs. The record makes it clear that none of the defendant teachers encouraged religious activity by reciting voluntarily or otherwise the prescribed "Fob James prayer." This bill was passed after the teachers were sued! Further, the plaintiffs made no showing that either of the teachers were aware of the state statute which provides for meditation or silent prayer. *Ala. Code* § 16-1-20.1 (Supp. 1982). The teachers testified they weren't aware of these statutes and were not conducting any activity in accordance thereto. Tr. 200-201.

Defendants-Petitioners submit the teachers were exercising what they thought to be their "God given rights." They have a right to speak. They feel they have a right to pray. *Isn't voluntary prayer free speech?* It appeared from the trial testimony that plaintiff, Ishmael Jaffree desired to silence speech of many types if possible. He saw the pledge of allegiance as being an unnecessary trinket of history. Tr. 225. In fact, subsequent to the trial of this case he notified the Superintendent by letter of January 20, 1983 that he now objected to the national anthem and has requested that his children not be subjected to it. He asked they be removed from the classroom during its recitation. The plaintiff in his appeal brief complained that his children were being made to suffer by exposing the fact that they were "different" than their peers each time they leave the classroom to

protect their First Amendment freedom. Who made Mr. Jaffree's children different? Since neither the children, their mother, or any experts testified as to damages, it appears that Mr. Jaffree's one man crusade made his own children different. Is singing the national anthem or saying the pledge of allegiance a denial of Mr. Jaffree's First Amendment freedom? Mr. Jaffree contended that it was. If so, where do our freedoms begin and where do his stop?

As long as the activity in the classroom, whether it be a recital of a voluntary prayer, the pledge of allegiance or singing the national anthem is not disruptive to the educational environment, such conduct should be permissible whenever it is permissible for teachers or students to speak. Anything less is inconsistent with fairness, logic and a correct interpretation of the Constitution.

The district court examined the facts of this case and the earlier case law precedents and found the teachers' activities to be constitutional. The district judge is significantly more familiar with the facts of this litigation and is most able to assess their meaning. The judgment of the district court is correct and should be reinstated.

II.

WHETHER EVENTS PRIOR TO THE ADOPTION OF THE FIRST AMENDMENT PROVE THAT IT DOES NOT PROHIBIT THE DEFENDANT SCHOOL TEACHERS FROM PERMITTING VOLUNTARY PRAYER IN THE CLASSROOM.

The Defendants-Petitioners contend the Plaintiffs-Respondents failed to prove a First Amendment violation at the trial before the United States District Court. The Plaintiffs-Respondents' only expert confined most of his testimony to definitions of religions and secular humanism. Although he felt children should be allowed to voluntarily and verbally pray in the classroom if they are not disruptive (Tr. 501), he stated that those who participate in such activities are bad Americans. TR. 428.

In the areas of history and law Dr. McKown attempted to shape himself into a constitutional scholar, however it was readily apparent that he had enough problems with his own alleged area of expertise without getting too far afield. In short, he knew nothing about constitutional law. Tr. 507.

On the other hand, the defendants offered unrebutted testimony from a widely recognized constitutional scholar, Dr. James McClellan, on the issue of the intent of the founding fathers in enacting the Bill of Rights. Dr. McClellan was an uncontradicted expert on constitutional law and the history of the First and Fourteenth Amendments of the United States Constitution. Tr. 522.

Dr. McClellan contended the modern rulings of the Supreme Court on school prayer were not based on the Constitution of the United States, and he was unmoved by the rationale of the decisions issued in *Engel v. Vitale, supra*, and *School District of Abington Township Pa. v. Schempp, supra*, since neither of these cases addressed or even looked into the history of the religion clause of the First Amendment in order to find its meaning. Dr. McClellan's testimony clearly reflected a scholarly and most accurate approach to the analysis of the religion clause. Tr. 519-605.

Dr. McClellan stated the establishment clause actually had a dual purpose. Tr. 525. Dr. McClellan stated its dual purpose was to guarantee the people of this country that the federal government would not impose a national religion, and guarantee to the states the right to define the meaning of religious establishment under their own state constitutions and laws. Id. He stated, "The real object of the First Amendment was not to countenance, much less to advance Mohammedism, Judaism, or infidelity by prostrating Christianity, but to exclude all rivalry among *Christian* sects and to prevent any national ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the na-

tional government. . . ." Tr. 530. J. McClellan, *The Making and the Unmaking of the Establishment Clause*, in *A Blueprint for a Judicial Reform* 295 (P. McGuigan & R. Rader eds. n.d.) (quoting J. Story, III, *Commentaries on the Constitution* § 1871 (1833) (emphasis added)

The prohibition in the First Amendment against the establishment of religion gave the states, by implication, full authority to determine church-state relations within their respective jurisdictions. The federal government had no authority over the states respecting the matter of church-state relations. Id.

A close look at history prior to and during the adoption of the First Amendment leaves little doubt as to the meaning and purpose of the religion clause in the First Amendment. At the beginning of the Revolution established churches existed in nine of the colonies. See J. McClellan, *supra* note 6, at p. 300. The states retained the Christian religion as the foundation stone of their social, civil and political institutions. Id. at p. 307. The First Amendment in large part guaranteed the states they would be able to continue whatever church-state relationship existed in 1791. Tr. 525.

The drafters of the First Amendment knew the First Amendment prohibited the federal government from establishing a national religion. Anything short of establishing a national church was not seen as a violation of the First Amendment. Tr. 535, 540. The debates in the First Congress and the legislature proposals offered during the adoption of the First Amendment prove the intent of the framers of the First Amendment. Tr. 525-529. On May 1, 1789 the House elected and paid with government funds a chaplain, Reverend William Linn. See R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* at p. 23 (1982). At the Constitutional Convention on June 28, 1787 Dr. Benjamin Franklin suggested that a morning prayer might speed

progress during the debates. Franklin told the Convention and its President, George Washington, that he had lived a long time. The longer he lived the more persuaded he was "*that God governs* in the affairs of men." R. Cord, *supra* at p. 24 and R. 498.

On September 24, 25 and 26, 1789, the Senate and House of Representatives approved the First Amendment and sent it to the States for ratification. At the same time they called upon President Washington to "recommend to the people of the United States a day of public thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many single favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness." Annals of Congress I, 949. It is interesting to note that the President's thanksgiving proclamation was endorsed by James Madison which should indicate Madison's view on the role between church and state. R. 469. The First Congress also reenacted the Northwest Ordinance of 1787 which recognized "religion, morality, and knowledge" as proper objects of public education in the territories. Ord. of 1787, Jul. 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* (Washington, DC: Government Printing Office, (1927) 52.

During the entire debates not one word was mentioned indicating the original Framers intended to create a secular government devoid of official expression of faith in God in public laws and institutions. Not one word is mentioned that indicated the Framers intended to prohibit school children from thanking God for their food prior to going to lunch. Defendants submit the Framers would have scoffed at the thought of such an interpretation of the religion clause.

The adoption of the Federal Constitution of 1789 and the Bill of Rights in 1791 had no legal effect on church-

state relations in the separate states. To adopt a Constitutional doctrine that gives such legal effect ignores the federalism of the First Amendment. The common understanding in 1791 and for more than a century thereafter on the question of church-state relations is unmistakably clear. As. Dr. McClellan stated, those who participated in the framing and adoption of the First Amendment clearly recognized that government could promote religion and not violate the First Amendment. Tr. 541.

III.

WHETHER THE FOURTEENTH AMENDMENT INCORPORATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT AGAINST THE STATES THEREBY PROHIBITING THE DEFENDANT TEACHERS FROM PERMITTING VOLUNTARY PRAYER IN THE CLASSROOM.

A. Events Prior to Adoption of Fourteenth Amendment of the United States Constitution as Ratified in 1868.

Defendants-Petitioners submit there is no provision in the Fourteenth Amendment which has made the religion clause of the First Amendment applicable to the states. Dr. McClellan stated that there was no documentary evidence to support the claim that the framers and backers of the Fourteenth Amendment ever intended to apply the establishment clause to the states. He stated this issue was not even debated when the Fourteenth Amendment was prepared and drafted into Congress. Further, it was not debated or discussed when the Fourteenth Amendment was ratified. Tr. 544, 545. The language of the Fourteenth Amendment contains only one provision of the federal Bill of Rights, namely the due process clause of the Fifth Amendment. No provision in the First Amendment nor any other provision of the federal Bill of Rights was proposed for inclusion in the Fourteenth Amendment. Thus, the due process clause has remained the only provision of the federal Bill of Rights

which the Fourteenth Amendment has made applicable to the states.

The due process clause of the Fourteenth Amendment reads:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law."

There was no discussion with respect to that clause, when the 39th Congress debated the Fourteenth Amendment in 1866. The historical analysis of the First and Fourteenth Amendment points to the conclusion that the Fourteenth Amendment was not intended to confer jurisdiction over the First Amendment to the federal government.

The 1st Congress which proposed the Bill of Rights, rejected attempts to apply portions of it to the states. James Madison's proposed series of amendments attempting to apply portions to the states were defeated in the Senate. See J. McClellan, *supra* at p. 315. There are a host of cases which secured one of the major objectives of the Bill of Rights and that is to insure each state that the federal government would not encroach upon the jurisdiction of the states over such matters as church-state relations. Dr. McClellan testified that between 1817 and 1920 the Supreme Court "stuck fast" to insuring that the Bill of Rights did not apply to the states. Tr. 528, 529. The Supreme Court respected these views for nearly a century and a half. Chief Justice Marshall declared in *Barron v. the Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) that the first eight amendments "contained no expression indicating an intention to apply them to state governments." Subsequent decisions indicate that this position was maintained involving the First, Fifth, Seventh and Eighth Amendments between 1833 and 1868. In *Permoli v. First Municipality of New Orleans*, 44 U.S. (3 How.) 588 (1845) the Court upheld a municipal ordinance challenged by the Catholic Church, asserting that:

> "The Constitution makes no provision for protecting the citizens of the respective states and their religious liberties; this is left to the state constitution and laws."

This writer agrees with the district court's statement on page 32 of the district court's opinion which states:

> "The paramount consideration in defining the scope of any constitutional provision or legislative enactment is to ascertain the intent of the legislature. The intention of the legislature may be evidenced by statements of the leading proponents. . . ." R.476.

To prove the *intent* of a constitutional amendment defendants submit the *intention of its drafters must be examined.* If it could be demonstrated that the Framers of the Fourteenth Amendment deliberately sought to apply the Bill of Rights to the states then the original purpose of the establishment clause would not be paramount. The intent of the Framers of the Fourteenth Amendment of 1868 would supersede that of the Framers of the First Amendment as ratified in 1791. However, there is an abundance of evidence drawn from the debates of the 39th Congress, campaign speeches and newspaper articles pointing to the conclusion that the Fourteenth Amendment was not intended to confer jurisdiction over the First Amendment to the federal government or reverse the decisions in *Barron v. Baltimore, supra* and *Permoli v. New Orleans, supra. See* C. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5 (1949). The district court made note of the historical evidence in support of defendants' position. R. 37.

B. Events Subsequent to Adoption of the Fourteenth Amendment and Rejection of "Blaine Amendment".

Events subsequent to the adoption of the Fourteenth Amendment affirmatively prove the lawmakers of the 39th Congress did not intend the establishment clause to become binding on the states.

With respect to the establishment clause an unrebuttable argument can be made against the incorporation theory. This argument is based on the rejection of the "Blaine Amendment."

The 44th Congress considered a resolution for the adoption of a constitutional amendment introduced by James Blaine which provided that:

> " 'No state make any law respecting an establishment of a religion or prohibit the free exercise thereof;' and that no public money or public lands shall ever be under the control of any religious sect or denomination." 4 CONG REC. 5580 (1876).

The proposal failed to pass the Senate. 4 CONG. REC. 5595 (1876). This occurred only seven years after the ratification of the Fourteenth Amendment. Significantly, the Congress which considered the Blaine Amendment included 23 members of the 39th Congress which adopted the Fourteenth Amendment. The Blaine Amendment's clear rejection by the 44th Congress shows undisputedly a general understanding among the participants that the Fourteenth Amendment left undisturbed the system of church-state relations established under the Bill of Rights.

The rejection of the Blaine Amendment *alone* should be convincing evidence that the religion clause had not been made applicable to the States by the Fourteenth Amendment. Dr. McClellan stated that many scholars say it is dispositive of the issue. Tr. 546. The district court agreed with this analysis and its judgment should be reinstated. R. 488.

IV.

WHETHER VOLUNTARY PRAYER IN THE CLASSROOM VIOLATES THE ESTABLISHMENT CLAUSE?

The established precedent for a century and a half uniformly allowed states to set public policy regarding church-state relations. Even after the adoption of the Fourteenth Amendment the case of *Prudential Insurance Company v. Cheek*, 259 U.S. 530 (1922) stated that:

> "Neither the Fourteenth Amendment or any other provision of the Constitution imposes restrictions upon the states about freedom of speech."

Dr. McClellan stated that the Court reversed itself in 1925 when it offhandedly remarked in *Gitlow v. New York*, 268 U.S. 666 (1925) that:

> "For present purposes we may and do assume that freedom of speech and of press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states." *See* J. McClellan, *supra* at 316.

This was the first case wherein the Supreme Court applied the Fourteenth Amendment to the First Amendment. Dr. McClellan stated that this was the beginning of a piece meal incorporation of the First Amendment into the word "liberty" of the due process clause of the Fourteenth Amendment, thereby undermining one of the great objects of the Bill of Rights by applying it to the states. See J. McClellan, *supra*. Subsequent cases transferred freedom of assembly and freedom of religion to the Fourteenth Amendment, finally completing the incorporation of the First Amendment with the inclusion of the establishment clause in *Everson v. Board of Education*, 330 U.S. 1 (1947). See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

Prior to the case of *Everson*, *supra*, the established precedent for a century and a half uniformly allowed the states to set public policy regarding their relations with religious organizations. In *Everson*, *supra*, the Supreme Court expounded upon its interpretation of the establishment clause. Justice Black said the First Amendment was made applicable to the states by the Fourteenth, however the decision reflected little or no historical analysis of the First or the Fourteenth Amendments.

In *Everson*, *supra*, according to Dr. McClellan, the Supreme Court accomplished two rather remarkable feats. First, it applied the establishment clause to the states

for the first time. He stated from 1787 until 1947 the establishment clause had never been applied to the states. Tr. 549. The second feat or error described by Dr. McClellan was the adoption of the absolutist position. Justice Black said the establishment clause not only prohibits aid to specific religious sects but prohibits aid of any kind to religion generally. Tr. 549.

Justice Black's absolutist approach became the modern day foundation stone for the modern Court's misinterpretation of the establishment clause. The Court's later attempts to follow Justice Black's pronouncements are out of focus replays which Chief Justice Burger describes as "the internal inconsistency in the opinions of the Court." *Waltz v. Tax Commissioner of City of New York*, 397 U.S. 664 (1970).

Defendants submit that neither the absolutist approach or the modern day "balancing test" utilized in *Lemon v. Kurtzman, supra*, is based on a correct historical analysis or even a review of the state practices or contemporary opinions existing from 1787 to 1791. Defendants submit their evidence produced at trial and the district court's exhaustive historical analysis reflects the correct interpretation of the intent of the establishment clause. Nothing in the establishment clause prohibits teachers or students from voluntarily thanking God for their food prior to going to lunch. The common assumption that the Supreme Court shall determine state policies regarding church-state relations rather than such being determined by the U.S. Constitution was based on an improper interpretation of the establishment clause by the prior Courts.

In the past, the Supreme Court has misused the Fourteenth Amendment's due process clause as a conduit for extending federal jurisdiction and powers reserved to the states in order to bring them under federal control. In so doing it has also incorrectly analyzed the meaning of the establishment clause which has resulted in excluding the name of God from education in the classroom. The recent

decisions since 1962 such as *Engel v. Vitale, supra*, finding prayer unconstitutional are not based on constitutional history or a correct interpretation of the establishment clause. The district court's decision that voluntary prayer in the classroom does not violate the establishment clause is correct. The district court reviewed the relevant legislative history surrounding the adoption of both the First Amendment and of the Fourteenth Amendment. Looking at the plain language of these amendments it is clear that the establishment clause did not intend to forbid religious prayers in public schools. The defendants completely agree with the district court's conclusion stated on page 48 of its opinion (Appendix D) wherein the court stated:

> "Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional . . . ."

Although the consequence of a district court overruling Supreme Court precedent may be dramatic to say the least, defendants submit that such action is warranted in light of the testimony presented at trial. The teachers testified they were exercising matters of personal conscience and that the pre-meal phrases resulted from their belief that those who wish to say prayer may say it whether it be at home or at their place of employment. Defendants submit it is appropriate for the teachers and students in public school to pray before school, during class recess, at lunch, after school and even during the ride home on the school bus. No testimony was offered by the plaintiffs that the activity complained of in the plaintiffs' complaint disrupted either the classroom or the educational environment of the local schools. *To silence voluntary prayer is to silence free speech.* Constitutional conditions should be restored with respect to religion to insure that *the U.S. Supreme Court shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.*

CONCLUSION

It has been twenty years since this Court silenced prayers to God offered by teachers and students across this land. Judge Hatchett stated in the conclusion of the opinion (Appendix A) issued by the United States Court Of Appeals For The Eleventh Circuit "We do not decide today whether prayer in public schools is the proper policy to follow. This court merely applies the principles established by the Supreme Court". The Petitioners agree with the district court that the Supreme Court has erred in its reading of history.

During the district court trial, Your Petitioners produced for the first time an extensive and voluminous historical review of the establishment clause of the First Amendment and the Fourteenth Amendment as they relate to voluntary school prayer. This case gives the Court the opportunity to reassess its previous rulings by which this Court has assumed a power which was not given to it by the Constitution. The solid, historical evidence submitted by the Petitioners should greatly aid this Court in reexamining the relevant legislative history surrounding the adoption of the First and Fourteenth Amendments. The granting of this Petition will allow this Court to correct its prior decisions regarding voluntary prayer in the classroom. For the reasons contained herein, the Writ should be granted.

Respectfully submitted,

ROBERT C. CAMPBELL, III
Counsel of Record
ROBERT H. MUDD, JR.
MARY BETH MANTIPLY
Members of the Bar of the
Supreme Court of Alabama
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, Alabama 36609
Telephone: (205) 344-7241

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 83-7046, 83-7047

ISHMAEL JAFFREE, *et al.*,
Plaintiffs-Appellants,

v.

GEORGE C. WALLACE, *et al.*,
Defendants-Appellees,

DOUGLAS T. SMITH, *et al.*,
Intervenors.

ISHMAEL JAFFREE, *et al.*,
Plaintiffs-Appellants,

v.

BOARD OF SCHOOL COMMISSIONERS OF
MOBILE COUNTY, *et al.*,
Defendants-Appellees,

DOUGLAS T. SMITH, *et al.*,
Intervenors.

May 12, 1983

Appeals from the United States District Court
for the Southern District of Alabama

Before HATCHETT and CLARK, Circuit Judges, and SCOTT *, District Judge.

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* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.

HATCHETT, Circuit Judge:

We must decide whether the trial court correctly determined that the recitation of prayers in the Mobile County, Alabama, public schools and the implementation of two Alabama statutes permitting religious practices in those public schools do not violate the establishment clause of the first amendment to the Constitution of the United State.[1] We are not called upon to determine whether prayer in public schools is desirable as a matter of policy. Because we find that the trial court was incorrect, we reverse and remand with directions to the trial court to issue and enforce an injunction prohibiting these unconstitutional practices.

Ishmael Jaffree, the appellant, is the father of five minor children, three of whom are enrolled in the Mobile County, Alabama, public schools. Jaffree's original action challenged the right of teachers in the public schools of Mobile County to conduct prayers in their classes, including group recitations of the Lord's Prayer. Before filing this action, Jaffree attempted to have the teachers discontinue prayer activities in those classes which his children attended. Jaffree held conversations with the teachers, wrote letters to the superintendent of the school board, and made several telephone calls to the superintendent. When these efforts failed to halt the religious practices, Jaffree instituted this action against the appellee, Board of School Commissioners of Mobile County (Board). Jaffree alleged that in addition to the Lord's Prayer, the teachers and students also recited the following three prayers:

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[1] U.S. Const., amend. I, states that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(1) God is great, God is good, Let us thank Him for our food, bow our heads we all are fed, Give us Lord our daily bread. Amen.

(2) God is great, God is good Let us thank Him for our food.

(3) For health and strength and daily food we praise Thy name, oh Lord.

Jaffree amended his complaint to include class action allegations, which the district court denied. Jaffree filed a second amended complaint to include as appellees the Governor of Alabama, the attorney general, and other state education authorities. In this amended action, Jaffree challenged the constitutionality of Ala.Code § 16-1-20.1 (1982) and Ala.Code § 16-1-20.2 (former Ala.Act 82-735), which are known as the "Alabama school prayer statutes." Section 16-1-20.1 states that:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

Section 16-1-20.2 states that:

> From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.

The district court severed Jaffree's complaint into two causes of action: one related to those teachers' activities unmotivated by the statutes, and the other related to the statutes.[2] Following the severance, the court issued a preliminary injunction against the implementation of the Alabama school prayer statutes. *Jaffree By and Through Jaffree v. James*, 544 F.Supp. 727 (S.D.Ala. 1982). After trial on the merits, the district court dismissed both actions, thereby dissolving the preliminary injunction. *Jaffree v. Board of School Commissioners of Mobile County*, 554 F.Supp. 1104 (S.D.Ala. 1983); *Jaffree v. James*, 554 F.Supp. 1130 (S.D.Ala. 1983). Pending appeal, Jaffree filed an emergency motion for stay and injunction in this court; we denied the motion.[3] Jaffree requested Justice Powell, in his capacity as Eleventh Circuit Justice, to stay the trial court's order or reinstate the preliminary injunction previously issued by the district court. In a memorandum opinion, Justice Powell granted the stay and reinstated the injunction pending final disposition of the appeal in this court. In the memorandum opinion, Justice Powell stated:

> In *Engel v. Vitale*, 370 U.S. 421 [82 S.Ct. 1261, 8 L.Ed.2d 601] (1962), the Court held that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits a State from authorizing prayer in the public schools. The following Term, in *Murray v. Curlett*, decided with *School District of Abington*

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[2] This court ordered consolidation of *Jaffree v. Board of School Commissioners of Mobile County*, 554 F.Supp. 1104 (S.D.Ala. 1983), and *Jaffree v. James*, 554 F.Supp. 1130 (S.D.Ala. 1983).

[3] The following were amicus parties on the appeal: Senator John P. East (North Carolina), Concerned Women for American Educational and Legal Defense Foundation, James Madison Institute—A Project of the North Carolina Conservative Research and Education Institute, Center for Judicial Studies, American Civil Liberties Union, Alabama Civil Liberties Union, American Jewish Congress, and the Anti-Defamation League of B-nai Brith.

> *Township v. Schempp*, 374 U.S. 203 [83 S.Ct. 1560, 10 L.Ed.2d 844] (1963), the Court explicitly invalidated a school district rule providing for the reading of the Lord's Prayer as part of a school's opening exercises, despite the fact that participation in those exercises was voluntary.
>
> Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them. Similarly, my own authority as Circuit Justice is limited by controlling decisions of the full Court.

Jaffree v. Board of School Commissioners of Mobile County, —— U.S. ——, ——, 103 S.Ct. 842, 843, 74 L.Ed.2d 924, 926 (1983).

The contentions of the state and county officials of Alabama are easily stated. First, the county education officials contend that if prayers are being recited in the Mobile County public schools, this activity is without state action or participation and not pursuant to any policy or statute authorizing or encouraging such activities. Second, the Alabama officials contend that the Supreme Court has misread history regarding the first amendment and has erred by holding that the first amendment is made applicable to the states through the fourteenth amendment. They present failure of the *Blaine* amendment of 1876 to pass Congress as strong evidence in support of these contentions.

The district court accepted the premise that the first amendment to the United States Constitution does not prohibit states from establishing a religion. The district court conceded that its decision was contrary to the entire body of the United States Supreme Court and Eleventh Circuit precedent, but declined to follow that precedent because, in its opinion, "the United States Supreme Court has erred in its reading of history." *Board of School Commissioners of Mobile County*, 554 F.Supp. at 1128.

HISTORY

Two views have been expressed regarding the interpretation of the history surrounding the establishment clause. One view is that the word "establishment" should be interpreted narrowly. Proponents of this view contend that the establishment clause prohibits only Congress, not the states, from establishing a religion. R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982); J. McClellan, *The Making and the Unmaking of the Establishment Clause*, A Blueprint for a Judicial Reform (P. McGuigan and R. Rader eds. n.d. 1981); E. Corwin, *The Supreme Court as a National School Board*, 14 Law and Contemporary Problems 3 (1949).

A second view results in a much broader interpretation of the establishment clause. Proponents of this view contend that the establishment clause prohibits any governmental support of religion on the state or federal level. L. Levy, *Judgments: Essays on American Constitutional History* (1972); L. Pfeffer, *Church, State, and Freedom* (rev. ed. 1967); R. Dixon, *Religion, Schools and the Open Society*, 13 Journal of Public Law 267, 278 (1964); *Katz, Freedom of Religion and State Neutrality*, 20 U.Chi.L. Rev. 426, 438 (1953). The Supreme Court has supported the broader view. *See Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1946); H. Chase & C. Ducat, *Constitutional Interpretation, Cases-Essays-Materials*, 1384 (2d ed. 1979).

The appellees argue that historically the first amendment to the United States Constitution was intended only to prohibit the federal government from establishing a national religion.[4] Appellees, additionally, argue that historical evidence does not support the fourteenth amend-

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[4] The intervenors, Douglas T. Smith, et al., (more than 500 teachers and parents) basically offered the same arguments as the appellees.

ment's incorporation of the first amendment. The appellee and the district court rely heavily on the research of historians. These historians believe the Supreme Court misread the history surrounding the establishment clause. They submit that the establishment clause has a dual purpose (1) to guarantee the people of this country that the federal government will not impose a national religion, and (2) to guarantee states the right to define the meaning of religious establishment under their state constitutions and laws.

The Supreme Court, however, has carefully considered these arguments and rejected them. *See, e.g., School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Engel*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948); *Everson*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1946). In *Everson*, the Court presented its careful review of this history surrounding the establishment clause. Justice Black wrote:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Everson, 330 U.S. at 15-16, 67 S.Ct. 511-512. Justice Rutledge, while dissenting on other grounds in *Everson*, observed that:

> Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. . . .

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.
>
> "Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

Everson, 330 U.S. at 31-32, 67 S.Ct. at 519. Justice Jackson, while dissenting on other grounds, also noted that:

> There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could . . . be made public business.
>
> This [religious] freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity.

Everson, 330 U.S. at 26, 67 S.Ct. at 516. Although differing on the outcome of the case, all Justices perceived the history of the establishment clause as prohibiting any government involvement with religion. This unanimity

also existed regarding the history of the first amendment's applicability to the states through the fourteenth amendment.

Appellees suggest that no documentary evidence exists supporting the claim that the fourteenth amendment was intended to apply the establishment clause of the first amendment to the states. To illustrate this point, the appellees turn to the rejection of the "*Blaine* amendment."[5] In 1876, Congress considered a resolution for the adoption of a constitutional amendment expressly forbidding a state from making any law relating to religion. The resolution failed in the Senate. *See* 4 Cong.Rec. 5595 (1876). The appellees argue that this refusal to pass the *Blaine* amendment is indicative of Congress's understanding that the fourteenth amendment left undisturbed the state's freedom to establish religion. This argument is the same as that urged and rejected in *McCollum*. 333 U.S. at 211 n. 7, 68 S.Ct. at 465 n. 7; *McGowan*, 366 U.S. 420, 81 S.Ct 1101, 6 L.Ed.2d 393 (1961). Chief Justice Warren, writing for the Court, stated: "[T]he First Amendment, in its final form, did not simply bar a congressional

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[5] Title 4 Cong.Rec. 5580 (1876) states, in pertinent part, that:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification for any office of public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of the United States, or any State . . . shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect . . . wherein the particular creed or tenets of any religious or anti-religious sect . . . shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supporting in whole or in part by such revenue or loan credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect . . . to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution . . . .

enactment *establishing* a *church;* it forbade all laws *respecting an establishment of religion.* Thus, this Court has given the Amendment a "broad interpretation . . . in light of its history and the evils it was designed forever to suppress.' " *McGowan*, 366 U.S. at 441-42, 81 S.Ct. at 1113 (emphasis in original). In *Engel v. Vitale*, the Court meticulously re-examined the history surrounding the first and fourteenth amendments and reaffirmed its view. The Court concluded that:

> By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

Engel, 370 U.S. at 429-30, 82 S.Ct. at 1266. The interplay between the first and fourteenth amendments engages scholars in endless debate. We are urged to remain mindful of the uses of history. History provides enlightenment; it appraises courts of the subtleties and complexities of problems before them. *See* Wofford, J., *The Blinding Light: The Uses of History in Constitution Interpretation*, 31 Univ. of Chi.L.Rev. 502, 532 (1964). The important point is: *the Supreme Court has considered and*

decided the historical implications surrounding the establishment clause. The Supreme Court has concluded that its present interpretation of the first and fourteenth amendments is consistent with the historical evidence.

PRECEDENT

Under our form of government and long established law and custom, the Supreme Court is the ultimate authority on the interpretation of our Constitution and laws; its interpretations may not be disregarded.

Although the district court recognized the importance of precedent, it chose to disregard Supreme Court precedent. The district court attempted to justify its actions by discussing the limited exceptions to the doctrine of stare decisis. The doctrine of stare decisis pertains to the deference a court may give to its own prior decisions. *See Hertz v. Woodman*, 218 U.S. 205, 212, 30 S.Ct. 621 622, 54 L.Ed. 1001 (1910). The stare decisis doctrine and its exceptions do not apply where a lower court is compelled to apply the precedent of a higher court. *See* 20 Am. Jur.2d *Courts* § 183 (1965).

Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. *Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 705-706, 70 L.Ed.2d 556 (1982); *Stell v. Savannah-Chatham County Board of Education*, 333 F.2d 55, 61 (5th Cir.), *cert. denied*, 379 U.S. 933, 85 S.Ct. 332, 13 L.Ed.2d 344 (1964); *Booster Lodge No. 405, Int. Ass'n of M. & A.W. v. NLRB*, 459 F.2d 1143, 1150 n. 7 (D.C. Cir. 1972). Justice Rehnquist emphasized the importance of precedent when he observed that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Davis*, 454 U.S. at 375, 102 S.Ct. at 706. *See Also, Thurston Motor Lines, Inc. v. Jordan K. Rand,*

Ltd., —— U.S. ——, 103 S.Ct. 1343, 75 L.Ed.2d —— (1983) (the Supreme Court, in a per curiam decision, recently stated: "Needless to say, only this Court may overrule one of its precedents."). The old Fifth Circuit articulated these positions when it stated that "no inferior federal court may refrain from acting as required by [a Supreme Court's] decision even if such a court should conclude that the Supreme Court erred as to its facts or to the law." *Stell*, 333 F.2d at 61. Judicial precedence serves as the foundation of our federal judicial system. Adherence to it results in stability and predictability. If the Supreme Court errs, no other court may correct it.

NON-STATUTORY PRAYER ACTIVITIES

The district court did not specifically analyze or discuss in detail the constitutionality of the two Alabama statutes. The court stated: "In light of the reasoning in [the school prayer activities case], the court holds that the claims in this case fail to state any claim for which relief could be granted under the federal statute." *Jaffree*, 554, F.Supp. at 1132. By permitting the Mobile County school prayer activities to survive the first amendment attack, the district court implicitly concluded that the Alabama school prayer statutes were constitutional. 554 F.Supp. at 1132.

The first amendment provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The objective of the first amendment's religious guarantees are two-fold: to preclude government interference with the practice of religious faith, and to preclude the establishment of a religion dictated by government. *Larkin v. Grendel*, —— U.S. ——, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982). This fundamental and enduring concept of separation of church and state was translated by early decisions into a wall "high and

impregnable." *See Reynolds v. United States*, 98 U.S. (8 Otto) 145, 164, 25 L.Ed. 244 (1878); *quoting* Reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802), *reprinted in* 8 Works of Thomas Jefferson 113 (Washington ed. 1861). The establishment clause requires that government be neutral in its relations between various religions and between non-believers and believers. *Everson*, 330 U.S. at 18, 67 S.Ct. at 513. Repeatedly, the Supreme Court has struck down the recitation of prayers, Bible readings, and devotional activities in public schools. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Engel*, 370 U.S. 421, 82 S. Ct. 1261, 8 L.Ed.2d 601 (1962). This circuit has also followed the Supreme Court's lead in holding that public school prayer is unconstitutional because it is inherently a religious exercise. *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981). Having recalled these well-settled principles of constitutional jurisprudence, we now turn to the Mobile County school prayer activities.

The appellee contends that since the teachers' prayer activities were not motivated by school board policy or by state statute, the establishment clause is not violated. The appellee reasons that since no Board policy existed or no statutory authority motivated the teachers' prayer activities, no state involvement exists. Thus, the establishment clause is inapplicable by virtue of the absence of state action.

Under Alabama law, teachers are appointed, suspended, and removed by the county school boards. *See* Ala.Code § 16-8-23 (1927). The Alabama county school boards are creatures of the state and are controlled by the state. *See* Ala.Code § 16-3-11 (1927); Ala. Code § 16-8-8 (1927); *Lee v. Macon County Board of Education*, 267 F.Supp. 458 (M.D.Ala. 1967); *Opinion of the Justices*, 276 Ala. 239, 160 So.2d 648, 650 (Ala. 1964). It is clear from the record that the Board members were on notice

of the teachers' prayer activities and took no steps to discourage these activities.[6] Evidence exists to indicate that a large number of teachers discussed the prayer activities with the superintendent of schools. On this record, it is easy to find that the Board's actions ratified the teachers' conduct. If a statute authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional. In *Schempp*, Justice Douglas, in his concurring opinion, pointed out the mockery that would be made of the establishment clause if constitutional activities could be carried on merely because no statute authorized the activities. 374 U.S. at 230, 83 S.Ct. at 1575-1576.

The Supreme Court has enunciated three standards that a statute must satisfy in order to survive a first amendment attack: first, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 773, 93 S.Ct. 2955, 2965-2966, 37 L.Ed.2d 948 (1973); *Walz v. Tax Commission*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970). *See Murray v. Curlett*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); and *Engel*, 370 U.S. 421, 82 S.Ct.

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[6] The district court found as a fact:

> Finally, Ms. Boyd was made aware of the contents of a letter drafted by Mr. Jaffree, dated May 10, 1982, which had been sent to Superintendent Hammons complaining about the prayer activity in Ms. Boyd's classroom. . . . [*Board of School Commissioners of Mobile County*, 554 F.Supp. at 1107.]
>
> Upon learning of the plaintiff's concern over prayer activity in their schools, defendants Reed and Phillips consulted with teachers involved, however, neither defendant advised or instructed the defendant teachers to discontinue the complained of activity. [554 F.Supp. at 1108.]

1261, 8 L.Ed.2d 601 (1962). If a statute does not meet this standard, it must fall to the first amendment's prohibitions. *Stone v. Graham*, 449 U.S. 39, 40-41, 101 S.Ct. 192, 193-194, 66 L.Ed. 2d 199 (1980). The objective of these tests is to insure neutrality of government involvement in religious activity. *E.g. Watson v. Jones*, 13 Wall. 679, 728, 20 L.Ed. 666 (1872).

In applying the Supreme Court's *Kurtzman* test, the Eleventh Circuit in the recent case of *American, etc. v. Rabun County Chamber of Commerce*, 678 F.2d 1379 (11th Cir. 1982), held that the establishment clause may be violated by actions of state officials where no statute or ordinance authorizes the particular activity. In that case, Judge Tuttle, writing for the court stated:

> In interpreting the Establishment Clause, the Supreme Court has identified three tests to be applied to the challenged *actions* of a state:
>
> (1) Whether the *action* has a secular purpose;
>
> (2) Whether the "principal or primary effect" is one which neither "advances nor inhibits religion;" and
>
> (3) Whether the *action* fosters "'an excessive government entanglement with religion.' *Waltz* [*v. Tax Commissioners*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)]."

678 F.2d at 1389 (emphasis added).

Although prayer activities in public schools may not be statutorily authorized or conducted pursuant to written school board policy, if state action is present and the activities satisfy the statutory test articulated by the Supreme Court as modified by this circuit, the activities may be declared unconstitutional. *See Burton v. Wilmington Parking Auth.*, 365 U.S 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90

L.Ed. 265 (1946). The reach of the establishment clause is not limited by the lack of statutory authorization. *See Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Murray*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Engel*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed. 2d 601 (1962). Here, we are not concerned with the mechanism used to advance a concept, but the evil against which the clause protects. *See Nyquist*, 413 U.S. at 772, 93 S.Ct. at 2965.

This circuit has stated that "prayer is perhaps the quintessential religious practice . . . since prayer is a primary religious activity in itself, its observance in public school classrooms [implies a religious purpose]." *Treen*, 653 F.2d at 901. Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied. The primary effect of prayer is the advancement of ones religious beliefs. It acknowledges the existence of a Supreme Being. The involvement of the Mobile County school system in such activity involves the state in advancing the affairs of religion. The Supreme Court and this circuit have indicated that such prayer activities cannot be advanced without the implication that the state is violating the establishment clause. *Schempp* and *Treen*. Indeed, the Supreme Court held in *McCollum* that use of a tax-supported building for the advancement of religious activity, in close cooperation with school authorities, violated the establishment clause. *McCollum*, 333 U.S. at 209, 68 S.Ct. at 464; *cf. Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (religious instruction off school grounds implemented by New York school board held constitutional). The record indicates that the teachers' prayer activities were conducted in the classrooms and did not appear to be secularly motivated. We, therefore, conclude that the Mobile County school activities are in violation of the establishment clause.

THE STATUTES

As to the statutes authorizing prayer, both statutes advance and encourage religious activities. The district court recognized this when it stated:

> The enactment of Senate Bill 8 [Alabama Act 82-735] and § 16-1-20.1 is an effort on the part of the State of Alabama to encourage a religious activity. Even though these statutes are permissive in form, it is nevertheless state involvement respecting an establishment of religion. *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1982). Thus, binding precedent which this Court is under a duty to follow indicates the substantial likelihood plaintiffs wil prevail on the merits.

James, 544 F.Supp. at 732. The statutes are specifically the type which the Supreme Court addressed in *Engel*. Aggravating in this case is the existence of a government composed prayer in Ala.Code § 16-1-20.2.

In *Engel*, the Supreme Court held unconstitutional the "non-denominational" state prayer approved for public schools. The prayer involved in *Engel* contained considerably fewer religious references than the prayer now before this court. The Supreme Court stated that "the constitutional prohibition against law respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group to recite as part of a religious program carried on by government." *Engel*, 370 U.S. at 425, 82 S.Ct. at 1264. Section 16-1-20.2, as its proponents admit, amounts to the establishment of a state religion. The record reveals that passage of the statute was motivated by religious considerations, and its intention to advance religious beliefs. The fact that the prayer is voluntary and non-denominational does not neutralize the state's involvement. The state must remain neutral not only between competing religious sects,

but also between believers and non-believers. *See Schempp*, 374 U.S. at 218, 83 S.Ct. at 1569. The practical effect of this neutrality means that state schools should not function to inculcate or suppress religious beliefs or habits of worship. The implications of the district court's opinion firmly recognizes that Alabama is involving itself in the affairs of religion. Section 16-1-20.2 violates the establishment clause of the first amendment and is therefore unconstitutional.

The objective of the meditation or prayer statute (Ala. Code § 16-1-20.1) was also the advancement of religion. This fact was recognized by the district court at the hearing for preliminary relief where it was established that the intent of the statute was to return prayer to the public schools. *James*, 544 F.Supp. at 731. The existence of this fact and the inclusion of prayer obviously involves the state in religious activities. *Beck v. McElrath*, 548 F.Supp. 1161 (M.D.Tenn.1982). This demonstrates a lack of secular legislative purpose on the part of the Alabama Legislature. Additionally, the statute has the primary effect of advancing religion. We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity that we shall scrutinize. Thus, the existence of these elements require that we also hold section 16-1-20.1 in violation of the establishment clause.

CLASS CERTIFICATION

Jaffree sought class certification under rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.[7] The

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[7] Fed.R.Civ.P. 23(a) and 23(b)(2) reads, in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder

complaint identified as the class, students currently enrolled in the Mobile County public school system. Upon the pleadings, the district court denied Jaffree's class certification.

Under Federal Rule of Civil Procedure 23, a class action determination is left to the sound discretion of the district court. *Zeidman v. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038-39 (5th Cir. 1981); 7A C. Wright & A. Miller, Federal Practice and Procedure, § 1785, at 134 (1972). The district court's decision is reversible only when it abuses its discretion. *See Guerine v. J & W Inv., Inc.*, 544 F.2d 863 (5th Cir.1977).

Jaffree contends the court abused its discretion by denying class certification without first holding an evidentiary hearing. He cites *Shepard v. Beaird-Poulan, Inc.*, 617 F.2d 87, 89 (5th Cir.1980), as authority for the requirement of an evidentiary hearing. We disagree with Jaffree's reading of *Shepard*. *Shepard* teaches that a district court must hold a hearing if it denies certification on the ground that the plaintiff would not adequately represent the class interest. *Shepard*, 617 F.2d at 89. In this instance, the court did not deny certification on this ground. We therefore affirm the district court's denial of class certification.

Appellees, state superintendent and state board, argue that no case or controversy exists between them and Jaf-

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of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

free. Appellees argue that the statutes give teachers the discretion of leading prayers, not the Board nor the state superintendent. Thus, they argue, neither the state board nor the state superintendent has the authority to implement or enforce the statutes. We find that a case or controversy exists between Jaffree and the county superintendent and county education board. Therefore, federal jurisdiction exists and the case or controversy question regarding the state board and the state superintendent becomes inconsequential.

CONCLUSION

Supreme Court and Eleventh Circuit precedent regarding prayer in public schools is abundantly clear. No new issues were presented to the district court. In keeping with this precedent, we hold that the Mobile County school prayer activities, Ala.Code § 16-1-20.1 and Ala.Code § 16-1-20.2, are in violation of the establishment clause of the first amendment to the Constitution of the United States. We do not decide today whether prayer in public schools is the proper policy to follow. This court merely applies the principles established by the Supreme Court. While many may disagree on the subject of prayer in public schools, our Constitution provides that the Supreme Court is the final arbiter of constitutional disputes. In this instance, these religious exercises failed to survive the three standards articulated by the Supreme Court. *See Lemon, Nyquist, Engel,* and *Everson.* Consequently, (1) we reverse the district court's dismissal of these actions, (2) affirm the decision denying class certification, (3) reverse the denial of costs to the appellants, and (4) remand the case to the district court. Upon remand the district court is directed to award costs to appellant and forthwith issue and enforce an order enjoining the statutes and activities held in this opinion to be unconstitutional.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED WITH DIRECTIONS.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7046

D.C. Docket No. CV82-0792-H

ISHMAEL JAFFREE, *et al.*,
Plaintiffs-Appellants,

versus

GEORGE C. WALLACE, *et al.*,
Defendants-Appellees,

DOUGLAS T. SMITH, *et al.*,
Intervenors.

No. 83-7047

D.C. Docket No. CV82-0554-H

ISHMAEL JAFFREE, *et al.*,
Plaintiffs-Appellants,

versus

BOARD OF SCHOOL COMMISSIONERS OF
MOBILE COUNTY, *et al.*,
Defendants-Appellees,

DOUGLAS T. SMITH, *et al.*,
Intervenors.

Appeals from the United States District Court
for the Southern District of Alabama

Before HATCHETT and CLARK, Circuit Judges, and SCOTT *, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED IN PART and REVERSED IN PART; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 12, 1983

ISSUED AS MANDATE:

* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 83-7046, 83-7047

ISHMAEL JAFFREE, *et al.*,
Plaintiffs-Appellants,

v.

GEORGE C. WALLACE, *et al.*,
Defendants-Appellees,

DOUGLAS T. SMITH, *et al.*,
Intervenors.

ISHMAEL JAFFREE, *et al.*,
Plaintiffs-Appellants,

v.

BOARD OF SCHOOL COMMISSIONERS OF
MOBILE COUNTY, *et al.*,
Defendants-Appellees,

DOUGLAS T. SMITH, *et al.*,
Intervenors,

Aug. 15, 1983

Appeals from the United States District Court
for the Southern District of Alabama

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion May 12, 1983, 11 Cir., 1983, 705 F.2d 1526)

Before HATCHETT and CLARK, Circuit Judges, and SCOTT *, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

RONEY, Circuit Judge, with whom TJOFLAT, HILL, and FAY, Circuit Judges, join dissenting:

I respectfully dissent from the denial of en banc reconsideration of the panel decision insofar as it held Ala. Code § 16-1-20.1 (Supp. 1982) unconstitutional under the Establishment Clause. The Alabama statute authorizes a teacher to observe a moment of silence for "meditation or voluntary prayer." [1] The case is worthy of en banc consideration under Fed. R. App. P. 35 for several reasons.

First, the case involves not only the constitutional rights of all the public school children in Alabama, but its significance transcends one state and one statute. According to a recent student law review Note, at least eighteen states have enacted similar laws permitting daily moments of silence in public schools. Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. Rev. 364, 372 & n. 44 (1983). Among

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* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.

[1] Section 16-1-20.1 provides:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

these is not only Alabama, but also Florida and Georgia, the other two states in this Circuit. Fla. Stat. Ann. § 233.062(2) (West Supp. 1983); Off. Code of Ga. Ann. §§ 20-2-1050-1051 (1982).

Second, the issue has not been heretofore definitively resolved. The Supreme Court has never determined the constitutionality of a moment of silence statute. Note, *supra*, 58 N.Y.U. L. Rev. at 368. Nor has there been cited any federal court of appeals decision directly on point. Other district courts that have considered the issue have split. *Compare, e.g., Duffy v. Las Cruces Public Schools*, 557 F.Supp. 1013 (D. N.M. 1983) striking down a New Mexico statute) *and Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982) (striking down a Tennessee statute) *with Gaines v. Anderson*, 421 F.Supp. 337 (D. Mass. 1976) (upholding a Massachusetts statute). The importance of this issue and the lack of controlling precedent make an en banc review worthwhile.

Third, there is some doubt as to the correctness of the panel opinion. Although a controversial issue, a number of this country's leading constitutional scholars have suggested that moments of silence may be permissible. *See* L. Tribe, *American Constitutional Law* § 14-6, at 289 (1978); Freund, *The Legal Issue, in Religion and the Public Schools* 23 (1965); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 Minn. L. Rev. 329, 371 (1963); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1041 (1963). *Gaines v. Anderson, supra*, was decided by a three-judge district court consisting of First Circuit Chief Judge Coffin and District Judges Murray and Skinner. In considering a virtually identical law the court reasoned:

> the statute as amended permits meditation or prayer without mandating the one or the other. Thus, the effect of the amended statute is to accommodate students who desire to use the minute of silence for

> prayer or religious meditation, and also other students who prefer to reflect upon secular matters.

421 F.Supp. at 343. That court held unanimously "[t]he fact that the [law as implemented] provides an opportunity for prayer for those students who desire to pray during the period of silence does not render [it] unconstitutional." *Id.* at 344. One Supreme Court Justice has implied that such a statute would not transcend the constitution. *See School District v. Schempp*, 374 U.S. 203, 281 & n. 57, 83 S.Ct. 1560, 1602 & n. 57, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring).

The testimony of the sponsor of the Alabama law, *Jaffree v. James*, 544 F.Supp. 727, 731 (S.D. Ala. 1982) should not be used to invalidate a neutral statute which is both facially and operationally constitutional. As Dean Choper has stated:

> Since each student could utilize this moment of silence for any purpose he saw fit, the activity may not be fairly characterized as solely religious, and since no student would really know the subject of his classmates' reflections, no one could in any way be compelled to alter his thoughts.

Choper, *supra*, 47 Minn. L. Rev. at 371.

However, the en banc court might resolve the issue, it is important and sufficiently unsettled to command its attention.

APPENDIX C

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-7046

ISHMAEL JAFFREE, *et al.*,
Plaintiffs-Appellants,

versus

FOB JAMES, *et al.*,
Defendants-Appellees,

DOUGLAS T. SMITH, *et al.*,
Intervenors.

No. 83-7047

ISHMAEL JAFFREE, *et al.*,
Plaintiffs-Appellants,

versus

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*,
Defendants-Appellees,

DOUGLAS T. SMITH, *et al.*,
Intervenors.

[Filed Jan. 27, 1983]

On Appeal from the United States District Court for the Southern District of Alabama

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Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

BY THE COURT

IT IS ORDERED that the emergency motions of appellants for stays and injunctions pending appeal are DENIED,

IT IS FURTHER ORDERED that the motion of appellants to consolidate the above referenced appeals is GRANTED,

The Clerk of this court is ordered to expedite these appeals with a briefing schedule allowing the appellants 20 days from the date of this order in which to file appellant's brief, and the appellees 15 days thereafter to file appellee's brief.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 82-0554-H

ISHMAEL JAFFREE; JAMAEL AAKKI JAFFREE, MAKEBA GREEN, and CHIOKE SALEEM JAFFREE, infants, by and through their best of friend and father, ISHMAEL JAFFREE,

Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY; DAN C. ALEXANDER, DR. NORMAN BERGER, HIRAM BOSARGE, NORMAN G. COX, RUTH F. DRAGO, and DR. ROBERT GILLIARD, in their official capacities as members of the Board of School Commissioners of Mobile County; DR. ABE L. HAMMONS, in his official capacity as Superintendent of the Board of Education of Mobile County; ANNIE BELL PHILLIPS, individually and in her official capacity as principal of MORNINGSIDE ELEMENTARY SCHOOL; JULIA GREEN, individually and in her official capacity as a teacher at MORNINGSIDE ELEMENTARY SCHOOL; BETTY LEE, individually and in her official capacity as principal of E.R. DICKSON ELEMENTARY SCHOOL; CHARLENE BOYD, individually and in her official capacity as a teacher at E.R. DICKSON ELEMENTARY SCHOOL; EMMA REED, individually and in her official capacity as principal of CRAIGHEAD ELEMENTARY SCHOOL; PIXIE ALEXANDER, individually and in her official capacity as a teacher at CRAIGHEAD ELEMENTARY SCHOOL,

Defendants.

MEMORANDUM OPINION

Prelusion

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

Farewell Address by
George Washington
Reprinted in R. Berger,
Government by Judiciary 299 (1977).

Ishmael Jaffree, on behalf of his three (3) minor children, seeks declaratory and injunctive relief. In the original complaint Mr. Jaffree sought a declaration from the Court that certain prayer activities initiated by his children's public school teachers violated the establishment clause of the first amendment to the United States Constitution. He sought to have these prayer activities enjoined.

A trial was held on the merits on November 15-18, 1982. After hearing the testimony of witnesses, considering the exhibits, discovery, stipulations, pleadings, briefs, and legal arguments of the parties, the Court enters the following findings of fact and conclusions of law.

I. *Findings of Fact*

Ishmael Jaffree is a citizen of the United States, a resident of Mobile County, Alabama, and has three (3) minor children attending public schools in Mobile County, Alabama: Jamael Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree.

Defendants. Annie Bell Phillips (principal) and Julia Green (teacher) are employed at Morningside Elementary School, where Jamael Aakki Jaffree attended school during the 1981-82 school year. Defendants Betty Lee (principal) and Charlene Boyd (teacher) are employed at E.R. Dickson Elementary School where Chioke Saleem Jaffree attended during the 1981-82 school year. Defendants, Emma Reed (principal) and Pixie Alexander (teacher) are employed at Craighead Elementary School where Makeba Green attended school during the 1981-82 school year. Each of these defendants is sued individually and in their official capacity. Each of the schools is part

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In this typewritten opinion the Court has opted to place its footnotes at the conclusion of the opinion, but in so doing does not intend to depricate the significance thereof to the opinion rendered. The publisher may or will opt to place the footnotes at the conclusion of each page.

of the system of public education in Mobile County, Alabama.

Dan Alexander, Dr. Norman Berger, Hiram Bosarge, Norman Cox, Ruth F. Drago and Dr. Robert Gilliard are members of the Board of School Commissioners of Mobile County, Alabama. As commissioners, each of these defendants collectively is charged by the laws of the State of Alabama with administering the system of public instruction for Mobile County, Alabama. These defendants are sued only in their official capacity.

Dr. Abe L. Hammons is the Superintendent of Education for Mobile County, Alabama. Defendant Hammons has direct supervisory responsibilities over all principals, teachers and other employees of the Mobile County Public School System. This defendant is sued only in his official capacity.

Defendant Boyd, as early as September 16, 1981, led her class at E.R. Dickson in singing the following phrase:

> God is great, God is good,
> Let us thank him for our food,
> bow our heads we all are fed,
> Give us Lord our daily bread.
> Amen!

The recitation of this phrase continued on a daily basis throughout the 1981-82 school year.

Defendant Boyd was made aware on September 16, 1981 that the minor plaintiff, Chioke Jaffree, did not want to participate in the singing of the phrase referenced above or be exposed to any other type of religious observances. On March 5, 1982, during a parent-teacher conference, Ms. Boyd was told by Chioke's father that he did not want his son exposed to religious activity in his classroom and that, in Mr. Jaffree's opinion, the activity was unlawful. Again, on March 11, 1982, Ms. Boyd received a handwritten letter from Mr. Jaffree which again advised her

that leading her class in chanting the referenced phrase was unlawful. This letter advised Ms. Boyd that if the practice was not discontinued that he would take further administrative and judicial steps to see that it was. Finally, Ms. Boyd was made aware of the contents of a letter drafted by Mr. Jaffree, dated May 10, 1982, which had been sent to Superintendent Hammons complaining about the prayer activity in Ms. Boyd's classroom. Notwithstanding Mr. Jaffree's protestations, the recitation of the prayer continued.

Defendant Lee learned on March 8, 1982, that Mr. Jaffree had complained about the prayer activities which were being conducted in defendant Boyd's classroom. Ms. Lee directly spoke with Mr. Jaffree on March 11, 1982, and learned from him that he was opposed to the prayer activities in Ms. Boyd's class and that he felt the same to be unconstitutional. On the same day, Ms. Lee called Mr. Larry Newton, Deputy Superintendent, who informed her that the prayer activity in Ms. Boyd's class could continue on a "strictly voluntary basis."

Defendant Pixie Alexander has led her class at Craighead in reciting the following phrase:

> God is great, God is good,
> Let us thank him for our food.

Further, defendant Pixie Alexander had her class recite the following, which is known as the Lord's Prayer:

> Our Father, which are in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our debts as we forgive our debtors. And lead us not into temptation but deliver us from evil for thine is the kingdom and the power and the glory forever. Amen.

The recitation of these phrases continued on a daily basis throughout the 1981-82 school year.

Defendant Pixie Alexander learned on May 24, 1982, that Mr. Jaffree had complained, through a letter dated May 10, 1982, to defendant Hammons, about her leading her class in the above-referenced prayer activity. After Ms. Alexander learned of Mr. Jaffree's May 10, 1982 letter, she continued to lead her class in reciting the referenced phrases.

Ms. Green admitted that she frequently leads her class in singing the following song:

> For health and strength and daily food,
> we praise Thy name, Oh Lord.

This activity continued throughout the school year, despite the fact that Ms. Green had knowledge that plaintiff did not want his child exposed to the above-mentioned song. *See* defendant Green's response to plaintiffs' Interrogatories Nos. 21, 22, 50 and 51.

Upon learning of the plaintiffs' concern over prayer activity in their schools, defendants Reed and Phillips consulted with teachers involved, however, neither defendant advised or instructed the defendant teachers to discontinue the complained of activity.

Prior to the 1981-82 school year, defendants Reed, Phillips, Boyd, and to a lesser extent, Green, each knew the Board of School Commissioners of Mobile County had a policy regarding religious activity in public schools. However, not one of the teachers sought or received advice from the board or the superintendent prior to the plaintiffs' initial complaint regarding whether their classroom prayer activities were consistent with the policy.

The policy on religious instruction adopted by the Board of School Commissioners of Mobile County reads as follows:

> *RELIGIOUS INSTRUCTION*
>
> Schools shall comply with all existing state and federal laws as these laws pertain to religious practices

and the teaching of religion. This policy shall not be interpreted to prohibit teaching about the various religions of the world, the influence of the Judeo-Christian faith on our society, and the values and ideals of the American way of life.

School attendance is compulsory in the State of Alabama. Alabama Code § 16-28-3 (1975).

The complaint in this case was later amended to include allegations against Governor Fob James and various state officials. The claims against the state officials were severed, Fed. R. Civ. P. 21, and they are the subject of a separate order which the Court entered today.

This recitation of the findings of fact is not intended to be an all-inclusive statement of the facts as they were produced in this case. Because of the following opinion the Court is of the impression that the facts above-recited constitute a sufficient recitation for deciding this case. However, in the event there is a disagreement with the conclusions reached by this Court, the Court does not desire to be precluded from a further recitation of appropriate fact as may be essential to further conclusions in the case. Examples of what the Court alludes to is the factual bases for consideration of the questions of freedom of speech, whether or not secular humanism is in fact a religion, and the propriety of the free exercise of religion.

II. *Conclusions of Law*

A. *Subject-Matter Jurisdiction*

This action is brought under 42 U.S.C. § 1983.[1] The complaint alleges that the subject-matter jurisdiction of

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[1] 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

the Court "is evoked pursuant to Title 28, Sections 1343 (3) and (4), and Sections 2201 and 2202 of the United States Code." *See* Complaint at 2 (filed May 28, 1982). Neither of the two amended complaints add anything to this jurisdictional allegation.[2]

The complaint alleges that rights guaranteed to the plaintiffs under the first and fourteenth amendments have been violated.[3] The subject-matter jurisdiction of a fed-

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of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Initially, it should be noted that neither 28 U.S.C. §§ 2201 nor 2202 afford any subject-matter jurisdiction to a federal court as the complaint alleges. These sections provide only a remedy.

> The operation of the Declaratory Judgment Act is procedural only. By passage of the Act, Congress enlarged the range of remedies available in the federal courts but it did not extent their subject-matter jurisdiction. Thus there must be an independent basis of jurisdiction, under statutes equally applicable to actions for coercive relief, before a federal court may entertain a declaratory judgment action.

10 C. Wright and A. Miller, *Federal Practice and Procedure* § 2766, 841 (1973) (footnotes omitted).

Likewise, 28 U.S.C. § 1343(4) does not afford subject-matter jurisdiction to a federal court over claims brought under 42 U.S.C. § 1983. Section 1343(4) affords subject-matter jurisdiction to the federal court only over those claims which are brought under "any Act of Congress providing for the protection of civil rights . . . ." "Standing alone, § 1983 clearly provides no protection for civil rights since . . . § 1983 does not provide any substantive rights at all." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 618 (1979).

[3] In fact, the complaint alleges that "[t]his cause of action arises under the First and Fourteenth Amendments to the United States Constitution . . . ." *See* Complaint at 2. This Court has previously explained that no implied cause of action exists under either the first or fourteenth amendments, at least when the first amendment is applied to persons acting under color of state law. The very purpose for enacting 42 U.S.C. § 1983 was to provide a

eral court over a claim arising under 42 U.S.C. § 1983 rests upon 28 U.S.C. § 1343(3). While the complaint does not allege that subject-matter jurisdiction is vested in the court under the general, federal-question jurisdictional statute, 28 U.S.C. § 1331, certainly subject-matter jurisdiction is vested under that provision since a federal district court has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, exclusive of the amount-in-controversy. Thus, the Court concludes that it has subject-matter jurisdiction over the claims alleged by the plaintiffs.[4]

B. *School-Prayer Precedent*

The United States Supreme Court has previously addressed itself in many cases to the practice of prayer and religious services in the public schools. As courts are wont to say, this court does not write upon a clean slate when it addresses the issue of school prayer.

Viewed historically, three decisions have lately provided general rules for school prayer. In *Engel v. Vitale*, 370 U.S. 421 (1962), *Abington v. Schempp*, 374 U.S. 203 (1963), and *Murray v. Curlett*, 374 U.S. 203 (1963), the Supreme Court established the basic considerations. As stated, the rule is that "[t]he First Amendment has

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remedy to vindicate the rights afforded by the federal Bill of Rights when persons acting under color of state law violated those rights. It would be incongruous to imply a remedy where Congress has expressly afforded a remedy. *See* Strong v. Demopolis City Board of Education, 515 F. Supp. 730, 732 n.1 (S.D. Ala. 1981) (per Hand, J.).

[4] "[T]he existence of a claim for relief under § 1983 is 'jurisdictional' for purposes for invoking 28 U.S.C. § 1343, even though the existence of a meritorious constitutional claim is not similarily required in order to invoke jurisdiction under 28 U.S.C. § 1331. *See* Bell v. Hood, 327 U.S. 678, 682 (1946); Mt. Healthy [City School District v. Doule, 429 U.S. 274, 278-79 (1977).]" Monell v. Department of School Services, 436 U.S. 658, 716 (1978).

erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (per Black, J.).

In *Engel v. Vitale* parents of public school students filed suit to compel the board of education to discontinue the use of an official prayer in the public schools. The prayer was asserted to be contrary to the beliefs, religions, or religious practices of the complaining parents and their children. In *Engel* the board of education, acting in its official capacity under state law, directed the principals to cause the following prayer to be said aloud by each class at the beginning of the day in each homeroom: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." 370 U.S. at 422. This prayer was adopted by the school board because it believed the prayer would help instill the proper moral and spiritual training needed by the students.

The parents argued that the school board violated the establishment clause of the first amendment when it directed that this prayer be recited in the public schools. The first amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I. The Supreme Court found "that by using its public school system to encourage recitation of the Regent's prayer, the State of New York ha[d] adopted a practice wholly inconsistent with the Establishment Clause." *Id.* at 422. The Court found this prayer to be a religious activity. The prayer constituted "a solemn avowal of devine faith and supplication for the blessing of the Almighty. The nature of such prayer has always been religious. . . ." *Id.* at 424-25. The Court noted that "[i]t [wa]s a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused

many of our early colonists to leave England and seek religious freedom in America." *Id.* at 425. Therefore, according to the Court, the prayer "breache[d] the constitutional wall of separation between Church and State." *Id.*

Citing historical documents, the Court observed that

> [b]y the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the danger of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services . . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government or change each time a new political administration is elected to office. Under the Amendment's prohibition against governmental establishment of religion, *as reinforced by the prohibitions of the Fourteenth Amendment, government in this country, be it state or federal,* is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

Id. at 429-30 (emphasis added).

The assertion by the Court that the establishment clause of the first amendment applied to the states was unaccompanied by any citation to authority. This conclusion was reached supposedly upon its examination of historical documents.

In dissent, Mr. Justice Stewart argued that the majority in *Engel* misinterpreted the first amendment. As Mr. Justice Stewart saw it, an official religion was not established by letting those who wanted to say a prayer say it. To the contrary, Mr. Justice Stewart thought "that to deny the wish of those school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." *Id.* at 445. As Mr. Justice Stewart saw the problem, our country is steeped in a history of religious tradition. That religious tradition is reflected in countless practices common in our institutions and governmental officials. For instance, the United States Supreme Court has always opened each day's session with the prayer "God save the United States and this Honorable Court." *Id.* at 446. Each President of the United States has, upon assuming office, swore an oath to God to properly execute his presidential duties. Our national anthem, "The Star-Spangled Banner," contains these verses:

> Blest with the victory and peace, may
> the heav'n rescued land
> Praise the Pow'r that hath made
> and preserved us a nation!
>
> Then conquor we must, when our
> cause it is just,
> And this be our motto "In God is
> our Trust."

Id. at 449. The Pledge of Allegiance to the Flag contains the words "one Nation *under God*, indivisible, with liberty and justice for all." *Id.* (emphasis in original). Congress added this in 1954. Mr. Justice Stewart believed that the Regent's prayer in New York had done no more than "to recognize and to follow the deeply enriched and highly cherished spiritual traditions of our Nation—traditions which came down to us from those who almost two hundred years ago avowed their 'firm Reliance on the Protection of devine Providence' when

they proclaimed the freedom and independence of this brave new world." *Id.* at 450.

Following the decision by the Supreme Court in *Engel*, the Court decided *Abington v. Schempp* and *Murray v. Curlett*. In *Abington*, a state law in Pennsylvania required that

> [a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

374 U.S. 205. The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of this statute. The Schempps contended that their rights under the fourteenth amendment of the United States Constitution were being violated.

Each morning at the Abington Senior High School between 8:15 a.m. and 8:30 a.m., while students were attending their homerooms, selected students would read ten verses from the Holy Bible. These Bible readings were broadcast to each room in the school building. Following the Bible readings the Lord's Prayer was recited. As with the Bible readings, the Lord's Prayer was broadcast throughout the building. Following the Bible readings and the Lord's Prayer, a flag salute was performed. Participation in the opening exercises, as directed by the Pennsylvania statute, was voluntary.

No prefatory statement, no questions, no comments, and no explanations were made at or during the exercises. Students and parents were advised that any student could absent himself from the classroom or, should he elect to remain, not practicable in the exercises.

In *Murray v. Curlett*, the Board of School Commissioners of Baltimore City adopted a rule which "provided for the holding of opening exercises in the schools of the

city, consisting primarily of 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.'" 374 U.S. at 211. An athiest, Mrs. Madalyn Murray, objected to the Bible reading and the recitation of the Lord's Prayer. After receiving the objection the board specifically provided that the Bible reading and the use of the Lord's Prayer should be conducted without comment and that any child could be excused from participating in the opening exercises or from attending them upon the written request of his parent or guardian.

Because of the similarity of the issues in both the *Abington* case and the *Murray* case the Supreme Court consolidated both cases on appeal and decided them together. The Court recognized that "[i]t is true that religion has been closely identified with our history and government. . . . 'The history of man is inseparable from the history of religion. And . . . since the beginning of that history many people have devoutely believed that "More things are wrought by prayer than this world dreams of."'" *Abington School District v. Schempp*, 374 U.S. at 212-13 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). Notwithstanding this recognition by the Court that the early history of this country, together with the history of man, was inseparable from religion the Court found the Bible reading and the recitation of the Lord's Prayer to be an unconstitutional abridgement of the first amendment prohibition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

The Court noted that the first amendment prohibited more than governmental preference of one religion over another. Rather, the first amendment was intended "'to create a complete and permanent separation of the spheres of religious activity in civil authority by comprehensively forbidding every form of public aid or support for religion.'" *Id.* at 217 (quoting *Everson v. Board of Education*, 330 U.S. 31-2 (1947)). The Court reviewed

several of its precedents which touched on the establishment of religion, and concluded that " '[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.' " *Id.* at 219-20 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). The Court in *Abington* reasoned from its own precedent rather than independently reviewing the historical foundation of the first and the fourteenth amendments. The Court held that the Bible reading and the recitation of the Lord's Prayer in both cases were religious exercises. The "rights," *id.* at 224, of the plaintiffs were being violated. The religious character of the Bible reading and the recitation of the Lord's prayer were not mitigated by the fact that students were allowed to absent themselves from their homerooms upon request of their parents. "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . ." *Id.* at 225.

The principles enunciated in *Engel v. Vitale*, *Abington v. Schempp*, and *Murray v. Curlett* have been distilled to this. "To pass muster under the Establishment Clause, the governmental activity must, first, reflect a clearly secular governmental purpose; second, have a primary effect that neither advances nor inhibits religion; and third, avoid excessive government entanglement with religion. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973)." *Hall v. Board of School Commissioners*, 656 F.2d 999, 1002 (5th Cir. 1981). "If a statute [or official administrative directive] violates *any* of these three principles, it must be struck down under the Establishment Clause." *Stone v. Graham*, 101 S.Ct. 192, 193 (1980) (holding that a Kentucky

statute requiring posting of copy of Ten Commandments on walls of each public school classroom in state had preeminent purpose which was plainly religious in nature, and statute was thus violative of establishment clause and that avowed secular purpose was not sufficient to avoid conflict with first amendment; emphasis added).

Indeed, in this circuit, prayer in public schools is per se unconstitutional. "Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise." *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981).

In sum, under present rulings the use of officially-authorized prayers or Bible readings for motivational purposes constitutes a direct violation of the establishment clause. Through a series of decisions, the courts have held that the establishment clause was designed to avoid any official sponsorship or approval of religious beliefs. Even though a practice may not be coercive, active support of a particular belief raises the danger, under the rationale of the Court, that state-approved religious views may be eventually established.

Although a given prayer or practice may not favor any one sect, the principle of neutrality in religious matters is violated under these decisions by any program which places tacit govermental approval upon religious views or practices. While the purpose of the program might be neutral or secular, the effect of the program or practice is to give government aid in support of the advancement of religious beliefs. Thus the programs are held invalid without any consideration as to whether they excessively entangle the state in religious affairs.

In contrast, the Supreme Court has permitted the use of the Bible in a literature course where the literary aspects of the Bible are emphasized over its religious con-

tents. *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963). So long as the study does not amount to prayer or the advancement of religious beliefs, a teacher may discuss the literary aspects of the Bible in a secular course of study. Finally, the Supreme Court permits religious references in official ceremonies, including some school exercises on the basis that these references are part of our secularized traditions and thus will not advance religion. *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

In the face of this precedent the defendants argue that school prayers as they are employed are constitutional. The historical argument which they advance takes two tacts. First, the defendants urge that the first amendment to the U.S. Constitution was intended only to prohibit the *federal government* from establishing a *national* religion. Read in its proper historical context, the defendants contend that the first amendment has no application to the states. The intent of the drafters and adoptors of the first amendment was to prevent the establishment of a national church or religion, and to prevent any single religious sect or denomination from obtaining a preferred position under the auspices of the federal government.

The corollary of this historical intent, according to the defendants, was to allow the states the freedom to address the establishment of religions as an individual prerogative of each state. Stated differently, the election by a state to establish a religion within its boundaries was intended by the framers of the Constitution to be a power reserved to the several states.

Second, the defendants argue that whatever prohibitions were initially placed upon the federal government by the first amendment that those prohibitions were not incorporated against the states when the fourteenth amendment became law on July 19, 1868. The defendants have introduced the Court to a mass of historical documen-

tation which all point to the intent of the Thirty-ninth Congress to narrowly restrict the scope of the fourteenth amendment. In particular, these historical documents, according to the defendants, clearly demonstrate that the first amendment was never intended to be incorporated through the fourteenth amendment to apply against the states. The Court shall examine each historical argument in turn.

In the alternative, the defendant-intervenors argue that if the first amendment does bar the states from establishing a religion then the Mobile County schools have established or are permitting secular humanism, *see infra* note 41 (discussion of secular humanism), to be advanced in the curriculum and, being a religion, it must be purged also. Such a purge, maintain the defendant-intervenors, is nigh impossible because such teachings have become so entwined in every phase of the curriculum that it is like a pervasive cancer. If this must continue, say the defendant-intervenors, the only tenable alternative is for the public schools to allow the alternative religious views to be presented so that the students might better make more meaningful choices.

C. *First Amendment as Forbidding Absolute Separation* [5]

" '[T]he real object of the [F]irst amendment was not to countenance, much less to advance Mohammedanism, or Judaism, or infidelity, by prostrating Christianity, but

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[5] At the start the Court should acknowledge its indebtedness to several constitutional scholars. If this opinion will accomplish its intent, which is to take us back to our original historical roots, then much of the credit for the vision lies with Professor James McClellan and Professor Robert L. Cord. Their work and the historical sources cited in their work have proven invaluable to the Court in this opinion. *See* R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982); P. McGuigan & R. Rader, *A Blueprint for Judicial Reform* (eds. n.d.); J. McClellan, *Joseph Story and the American Constitution*, 118-159 (1971) (Christianity and the common law).

to exclude all rivalry among *Christian* sects and to prevent any *national* ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the *national* government.' "[6] The establishment clause was intended to apply only to the federal government. Indeed when the Constitution was being framed in Philadelphia in 1787 many thought a bill of rights was unnecessary. It was recognized by all that the federal government was the government of enumerated rights. Rights not specifically delegated to the federal government were assumed by all to be reserved to the states. Anti-Federalists, however, insisted upon a Bill of Rights as additional protection against federal encroachment upon the rights of the states and individual liberties. Excerpted testimony of James McClellan at 5-6 (trial testimony).

The federalists, who were the proponents of the Constitution, acceded to the demand of the Anti-Federalists for a Bill of Rights since, in the opinion of all, nothing in the Bill of Rights changed the terms of the original understanding of the federal convention. It was thought by all that the Bill of Rights simply made express what was already understood by the convention: namely, the federal government was a government of limited authority and that authority did not include matters of civil liberty such as freedom of speech, freedom of the press, and freedom of religion. *Id.* at 8-13.

The prohibition in the first amendment against the establishment of religion gave the states, by implication, full authority to determine church-state relations within their respective jurisdictions. "Thus the establishment clause actually had a dual purpose: to guarantee to each *individual* that Congress would not impose a national

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[6] McClellan, The *Making and the Unmaking of the Establishment Clause*, in *Blueprint for a Judicial Reform* 295 (P. McGuigan & R. Rader eds. n.d.) (quoting J. Story, III. *Commentaries on the Constitution* § 1871 (1833) (emphasis added)).

religion, and to each *state* that it was free to define the meaning of religious establishment under its own state constitution and laws. The federal government, in other words, simply had no authority over the states respecting the matter of church-state relations." [7]

At the begining of the Revolution established churches existed in nine of the colonies. Maryland, Virginia, North Carolina, South Carolina, and Georgia all shared Anglicanism as the established religion common to those colonies. *See* McClellan, *supra* note 6, at 300. Congregationalism was the established religion in Massachusetts, New Hampshire, and Connecticut. New York, on the other hand, allowed for the establishment of Protestant religions.[8] Three basic patterns of church-state relations dominated in the late eighteenth century. In most of New England there was the quasi-establishment of a specific Protestant sect. Only in Rhode Island and Virginia were all religious sects disestablished. "But all of the states still retained the Christian religion as the foundation stone of their social, civil and political institutions. Not even Rhode Island and Virginia renounced Christianity, and both states continued to respect and acknowledge the Christian religion in their system of laws." [9] At the time the Constitution was adopted ten of the fourteen states refused to prefer one Protestant sect over another.

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[7] *Id.*

[8] *Id.* at 300. Professor McClellan documents in great detail the political struggle which raged through the various colonies during the Revolution and afterwards to disestablish certain religions throughout the colonies. The establishment of one religion over another in the respective colonies was purely a political matter. The political strength of the various followers determined which religion was established. Like any other political decision, when the political strength of the minorities reached that of the majority, the state disestablished what had formerly been the majority religion. *See e.g., id.* at 301-308.

[9] *Id.* at 307.

Nonetheless, these these states placed Protestants in a preferred status over Catholics, Jews, and Dissenters.[10]

> The pattern of church-state relations in new states entering the Union after 1789 did not differ substantially from that in the original fourteen. By 1860—and the situation did not radically change for the next three quarters of a century—the quasi-establishment of a specific Protestant sect had everywhere been rejected; quasi-establishement of the Protestant religion was abandoned in most but not all of the states; and the quasi-establishment of the Christian religion still remained in some areas. A new pattern of church-state relations, the multiple or quasi-establishment of all religions in general, i.e., giving all religious sects a preferred status over disbelievers (the No Preference Doctrine) became widespread throughout most of the Union. Thus at the turn of the century, for example, no person who denied the existence of God could hold office in such states as Arkansas, Mississippi, Texas, North Carolina, or South Carolina.[11]

The first amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791. Excerpted testimony of James McClellan at 13 (from trial).

D. *Washington, Madison, Adams, and Jefferson*

The drafters of the first amendment understood the first amendment to prohibit the federal government only from establishing a national religion. Anything short of

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[10] *Id.*

[11] *Id.* at 311. Professor McClellan cites numerous examples in which the states required adherence to a Christian religion. For instance, witnesses were considered competent to testify only if they affirmed a belief in the existence of a Christian God. *Id.*

the outright establishment of a national religion was not seen as violative of the first amendment. For example, the federal government was free to promote various Christian religions and expend monies in an effort to see that those religions flourished. This was not seen as violating the establishment clause. R. Cord, *Separation of Church and State* 15 (1982).

The intent of the framers of the first amendment can be understood by examining the legislative proposals offered contemporaneously with the debate and adoption of the first amendment. For instance, one of the earliest acts of the first House of Representatives was to elect a chaplain. James Madison was a member of the congressional committee who recommended the chaplain system. On May 1, 1789 the House elected as chaplain, the Reverend William Linn. $500.00 was appropriated from the federal treasury to pay his salary. Even though the first amendment did not become part of the Constitution until 1791, had James Madison believed in the absolute separation of Church and State as some historians have attributed to him, James Madison would certainly have objected on this principle alone to the election of a chaplain.[12] At the Constitutional Convention on June 28, 1787 Dr. Benjamin Franklin suggested that a morning prayer might speed progress during the debates. Franklin told the Convention and its President, George Washington, that he had lived a long time. The longer he lived the more persuaded he was *"that God Governs in the affairs of men."* [13] Franklin "therefore beg[ged] leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in

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[12] R. Cord, *supra* note 5, at 23.

[13] R. Cord, *supra* note 5, at 24 (quoting Debates in the Federal Convention of 1787 as reported by James Madison, *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, (1927) 295-96 (emphasis in original)).

this Assembly every morning before we proceed to business, and that one or more of the clergy of this City be requested to officiate in that Service—"[14] Franklin's motion was not adopted for political reasons. Alexander Hamilton and others thought that the motion might have been proper at the beginning of the convention but that if the motion were adopted during the convention the public might believe that the convention was near failure. For this reason, which was wholly political, the issue was resolved by adjournment without any vote being taken.[15]

Presidential proclamations, endorsed by Congressman James Madison when Washington was President, dealing with Thansgiving, fasting, and prayer are all important in understanding Madison's views on the proper role between church and state.[16] Congress proposed a joint resolution on September 24, 1789, which was intended to allow the people of the United States an opportunity to thank Almighty God for the many blessings which he had poured down upon them. The resolution requested that President George Washington recommend to the citizens of the United States a day of public thanksgiving and prayer. Congress intended that the people should thank Almighty God for affording them an opportunity to estab-

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[14] *Id.* at 24-25.

[15] *Id.*

[16] The views of James Madison are often cited by those who insist upon absolute separation between church and state. Madison was one of the drafters of the first amendment. An uncritical, cursory examination of some of Madison's writings would lead one to the conclusion that Madison favored absolute separation between church and state. However, to reach this conclusion is to misunderstand the views of Mr. Madison.

As Professor Cord explains in his book, Madison was concerned only that the federal government should not establish a national religion. Nondiscriminatory aid to religion and support for various Christian religions was not viewed by Madison as unlawful. *See* R. Cord, *supra* note 5, at 25-26 (examining drafts of the establishment clause submitted by Madison).

lish this country.[17] This proclamation was submitted to the President the very day after Congress had voted to recommend to the states the final text of what was to become the first amendment to the United States Constitution.[18] As President, Madison issued four prayer proclamations. Excerpted testimony of James McClellan at 19.

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[17] Professor Cord explains in great detail the circumstances surrounding this presidential proclamation. *See* R. Cord, *supra* note 5, at 27-29.

[18] Professor Cord discusses in detail a document which Madison wrote late in his life known as the *Detached Memoranda*. Some historians have taken the *Detached Memoranda* as a blanket condemnation of religious proclamations issued by Presidents Jefferson, Madison, and Jackson. From this, some historians argue that James Madison believed that absolute separation was mandated by the establishment clause. The Supreme Court has relied upon the *Detached Memoranda* to justify its position of absolute separation in Abington School District v. Schempp, 374 U.S. 203, 225 (1963) ("[I]n the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' ").

Professor Cord suggests that the *Detached Memoranda* reflected nothing more than a shift in Madison's views as he grew older. The *Detached Memoranda* was written long after Madison had left office and long after the first amendment had been drafted. R. Cord, *supra* note 5, 29-36.

The explanation of Professor Cord that Madison is an old man, no longer in office, who regreted some of his past actions, is, to the Court, reasonable. Not all historical facts can easily be squared. Professor Cord emphasizes his point by analogizing to something which former President Nixon might write upon reflecting on his tenure as president. It would be odd, hypothesizes Professor Cord, if Mr. Nixon were to publish a book in his later years which concluded that taping conversations, without all parties being aware of the recording, is morally wrong and clearly a flagrant violation of the constitutional right to privacy. It would be nonsense, in the view of Professor Cord, for a Nixon biographer to conclude that Richard Nixon believed that the surreptitious tapings of conversations in the Oval Office were immoral and unconstitutional. R. Cord, *supra* note 5, at 36. Similarily, it is faulty to judge what Madison believed to be the scope of the establishment clause at the time he drafted the clause by looking to views expressd late in his life when there are numerous expressions of his intent contemporaneous with the period in which the establishment clause was drafted.

Thomas Jefferson is often cited along with James Madison as a person who was absolutely committed to the separation of church and state. The historical record, however, does not bear out this conclusion.

While Jefferson undoubtedly believed that the church and the state should be separate, his actions in public life demonstrate that he did not espouse the absolute separation evidenced in the modern decisions by the United States Supreme Court. For example, on October 31, 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians which provided that federal money was to be used to support a Catholic priest and to build a church for the ministry of the Kaskaskia Indians. The treaty was ratified on December 23, 1803. As Professor Cord points out in his book,[19] President Jefferson could have avoided the explicit appropriation of funds to support a Catholic priest and a Catholic church by simply leaving a lump sum in the Kaskaskia treaty which could have been used for that purpose. However, President Jefferson was not at all reluctant—for ought that appears on the historical record—to specifically appropriate money for a Catholic mission.

Unlike Presidents Washington, Madison, and Adams, when Jefferson was President he broke with the tradition of issuing executive religious proclamations. In Jefferson's view the establishment clause and the federal division of power between the national government and the states foreclosed executive religious proclamations. While refusing to issue executive religious proclamations, President Jefferson recognized that "no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority."[20] Thus, of the first four Presi-

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[19] R. Cord, *supra* note 5, at 37-39.

[20] R. Cord, *supra* note 5, at 40 (quoting Letter to a Presbyterian Clergyman (1808)).

dents, all of whom were close to the adoption of the Federal Constitution and the first amendment, only President Jefferson did not issue executive religious proclamations, and only President Jefferson thought that executive religious proclamations were not constitutional.

But even President Jefferson signed into law bills which provided federal funds for the propagation of the gospel among the Indians.[21] Based upon this historical record Professor Cord concludes that Jefferson, even as President, did not interpret the establishment clause to require complete independence from religion in government.

In sum, while both Madison and Jefferson led the fight in Virginia for the separation of church and state, both believed that the first amendment only forbade the establishment of a state religion by the *national* government. "Jefferson was neither at the Constitutional Convention nor in the House of Representatives that framed the First Amendment. The two Presidents who were at the Convention, Washington and Madison, and the President who framed the initial draft of the First Amendment in the House of Representatives, James Madison, issued Thanksgiving Proclamations."[22] The Court agrees with the studied conclusions of Dr. Cord that "it should be clear

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[21] Professor Cord chronicles the federal support provided to the Moravian Brethren at Bethlehem in Pennsylvania. The function of the Brethren was to civilize the Indians and to promote Christianity. First passed on July 27, 1787, the resolution supporting the Brethren was supported by every President, including Thomas Jefferson. The legislation supporting the Brethren was sectarian in character. Professor Cord reads this history to conclude that had this sort of interaction between church and state been thought to be unconstitutional then certainly the early Congresses and presidents would not have authorized expenditure of federal money. R. Cord, *supra* note 5, at 39-46.

[22] R. Cord, *supra* note 5, at 47.

that the traditional interpretation of Madison and Jefferson is historically faulty if not virtually unfounded . . . ."[23]

One thing which becomes abundantly clear after reviewing the historical record is that the founding fathers of this country and the framers of what became the first amendment never intended the establishment clause to erect an absolute wall of separation between the federal government and religion. Through the chaplain system, the money appropriated for the education of Indians, and the Thanksgiving proclamations, the federal government participated in secular Christian activities. From the beginning of our country, the high and impregnable wall which Mr. Justice Black referred to in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), was not as high and impregnable as Justice Black's revisionary literary flourish would lead one to believe.

Yet, despite all of this historical evidence, only last month the Supreme Court wrote that the purpose of the first amendment is

> twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other, could then coexist. *Jefferson's idea of a "wall," see Reynolds v. United States*, 98 U.S. (8 Otto) 145, 164 (1878), *quoting* Reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802), *reprinted in* 8 Works of Thomas Jefferson 113 (Washington ed. 1861), *was a useful figurative illustrative* to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, *see, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Walz v. Tax Commission*, 397 U.S. 664,

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[23] *Id.*

> 670 (1970), *but the concept of a "wall" of separation is a signpost.*

Larkin v. Grendel's Den, Inc., 51 U.S.L.W. 4025, 4027 (U.S. Dec. 13, 1982) (No. 81-878) (emphasis added). Enough is enough. Figurative illustrations should not serve as a basis for deciding constitutional issues.

For this Court, Professor Robert Cord, *see supra* note 5, irrefutably establishes that Thomas Jefferson's address to the Danbury Baptist Association cannot be relied upon to support the conclusion that Jefferson believed in a *wall* between church and state. "By this phrase Jefferson could only have meant that the 'wall of separation' was erected 'between Church and State' in regard to possible federal action such as a law establishing a national religion or prohibiting the free exercise of worship." *Id.* at 115. Overall the conduct of Thomas Jefferson was consistent with the conclusion that he believed, like all the other drafters of the Constitution and the Bill of Rights, that the states were free to establish religions as they saw fit.[24]

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[24] Since the states were historically free to establish a religion it follows that some irritation by non-believers or those in the religious minority was a necessary consequence of establishment. The complaint alleges that "[a]ll of the minor Plaintiffs are exposed to ostracism from their peer group class members if they do not participate in these daily devotional activities." Complaint at 5. The children "all have suffered and continue to suffer severe emotional distress from being forced to participate, via peer group pressure, in devotional observances orchestrated by the defendants." *Id.* at 7. This psychological pressure naturally flows anytime a state takes an official position on an issue. It does not make an establishment unconstitutional. For example, laissezfaire industrialists feel coerced when a state adopts tough environmental laws. Unemployed workers feel pressure from peer groups when the unemployed worker takes advantage of a state labor law which allows him to cross a union picket line to break a strike. Someone, somewhere feels coerced or pressured anytime the state takes a position. The Constitution, however, does not protect people from feeling uncomfortable. A member of a religious minority will have to develop a thicker skin if a state establishment offends him. Tender years are no exception.

E. *First Amendment as Applied to the States*

As has been seen up to this point the establishment clause, as ratified in 1791, was intended only to prohibit the federal government from establishing a national religion. The function of the establishment clause was twofold. First, it guaranteed to each individual that Congress would not impose a national religion. Second, the establishment clause guaranteed to each state that the states were free to define the meaning of religious establishment under their own constitutions and laws.

The historical record clearly establishes that when the fourteenth amendment was ratified in 1868 that its ratification did not incorporate the first amendment against the states. The debates in Congress at the time the fourteenth amendment was being drafted, the re-election speeches of the various members of Congress shortly after the passage by Congress of the fourteenth amendment, the contemporaneous newspaper stories reporting the effect and substance of the fourteenth amendment, and the legislative debates in the various state legislatures when they considered ratification of the fourteenth amendment indicate that the amendment was not intended to apply the establishment clause against the states because the fourteenth amendment was not intended to incorporate the federal Bill of Rights (the first eight amendments) against the states.

At the beginning the Court should acknowledge its indebtedness to Professor Charles Fairman, then a professor of law in Political Science at Stanford University, for the scholarly article which he published in 1949.[25] Professor Fairman examined in detail the historical evidence which Mr. Justice Black relied upon in *Adamson v. California*, 332 U.S. 46, 47 (1947), where Mr. Justice Black concluded that the historical events that culminated in the adoption of the fourteenth amendment demonstrated

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[25] Fairman, *does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5 (1949).

persuasively that one of the chief objects of the fourteenth amendment was to make the Bill of Rights applicable to the states.[26]

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[26] Mr. Justice Black spent nearly twenty years mulling over the criticisms leveled by Professor Charles Fairman. Finally, he had this to say:

> What I wrote [in Adamson v. California, 332 U.S. 46, 47 (1947),] in 1947 was the product of years of study and research. My appraisal of the legislative history [which surrounded the adoption of the fourteenth amendment and upon which Mr. Fairman relied so heavily] followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions, and proposed constitutional amendments. My Brother Harlan's objections to my *Adamson* dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the Stanford Law Review. 2 Stan. L. Rev. 5 (1949). I have read and studied this article extensively, including the historical references, and am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent. Professor Fairman's "history" relied very heavily what was "not" said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what "was" said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my "Adamson" dissent leave no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight amendments of the Constitution (the Bill of Rights) applicable to the states.

Charles Fairman "conclusively disproved Black's contention, at least, such as the weight of the opinion among disinterested ob-

1. *Debates*

The paramount consideration in defining the scope of any constitutional provision or legislative enactment is to ascertain the intent of the legislature. The intention of the legislature may be evidenced by statements of the leading proponents.[27] If statements of the leading proponents are found, those statements are to be regarded as good as if they were written into the enactment. "The intention of the lawmaker is the law." *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903).

> Looking back, what evidence [i]s there . . . to sustain the view that Section 1 was intended to incorporate Amendments I to VIII? [C]ongressman Bingham . . . did a good deal of talking about "immortal bill of rights" and one spoke of "cruel and unusual punishments." Senator Howard, explaining the new privileges and immunities clause, said that it included the privileges and immunities of Article IV, Section 2—"whatever they may be"—and also "the personal rights guarantied [*sic*] and secured by the first eight amendments . . . ." That is all. The rest of the evidence bore in the opposite direction, or was indifferent. Yet one reads in Justice Black's footnotes that, [*Adamson v. California*, 332 U.S. 46, 72 n.5 (1947)],
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> > A comprehensive analysis of the historical origins of the Fourteenth Amendment, Flack,

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servers." A. Bickel, *The Least Dangerous Branch* 102 (1962). Along with Alexander Bickel, Professor Raoul Berger agrees that Charles Fairman's analysis was right on the mark. R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 137 n.11 (1977).

[27] For example, Professor Raoul Berger cites several cases which recite this common principle of construction. *See e.g.*, Wright v. Vinton Branch, 300 U.S. 440, 463 (1937); Wisconsin Railroad Commission v. C. B. & Q. RR. Co., 257 U.S. 563, 589 (1922). *See* R. Berger, *supra* note 26, at 136-37 & 137 n.13.

> The Adoption of the Fourteenth Amendment (1908), 94 concludes that "Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:
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> 1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States.
>
> 2. To give validity to the Civil Rights Bill.
>
> 3. To declare who were citizens of the United States.
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> We have been examining the same materials as did Flack, and have quoted far more extensively than he. How can he on that record reach the conclusion that Congress proposed by Section 1 to incorporate Amendments I to VIII?

Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 Stan. L. Rev. at 65-66 (1949). Professor Flack explained that the incorporation was based upon remarks of Congressman Bingham and Senator Howard at the time the Thirty-ninth Congress voted upon the fourteenth amendment. Only those two said anything which could be construed as suggesting the result reached by Justice Black and the modern Supreme Court decisions.

Throughout the debates in the House over the meaning of the fourteenth amendment Professor Fairman shows convincingly that Congressman Bingham had no clear concept of what exactly would be accomplished by the passage of the fourteenth amendment. The explanations offered by Congressman Bingham to his colleagues were inconsistent and contradictory.[28]

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[28] Professor Fairman has quoted exhaustively from the Congressional Globe. The various speeches of Congressman Bingham made in support of the fourteenth amendment are quoted in detail. See

Together with Congressman Bingham's statements which suggested incorporation were remarks by Senator Howard. Senator Howard spoke with more preciseness

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Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5, 24-25 (1949).

The analysis of Professor Fairman is attacked vigorously by William Crosskey, then a professor of law at the University of Chicago Law School. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. Chi. L. Rev. 1 (1954). Crosskey quotes at length from the Bingham article and from the *Congressional Globe* in an effort to discredit the explanation offered the historical facts by Professor Bingham.

The debate between the two scholars was pitched. Much of Crosskey's analysis consisted of little more than *ad homineum* attacks on Professor Fairman. The attacks were answered in a reply article written by Professor Fairman. Fairman, *A Reply to Professor Crosskey*, 222 U. Chi. L. Rev. 144 (1954). After reading the original articles of both Fairman and Crosskey, the rebuttal of Fairman, and many other articles on the question, the Court is persuaded that the weight of the disinterested scholars supports the analysis of Professor Fairman. The work of Professor Crosskey impresses the Court as being designed to reach a result. Namely, Crosskey was interested in providing a constitutional basis to support the desegregation decision of the United States Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954). For instance, in an effort to explain a serious ambiguity in a Bingham speech, Professor Crosskey explains that the speech would make perfect sense if one assumes that Bingham had been reading directly from a text of the Constitution, that he had a copy of the document in his hand and that he was waving the copy while he spoke in Congress. "You're fudging, Professor Crosskey." You don't know that Bingham had been *reading* from the Constitution." Fairman, *A Reply to Professor Crosskey*, 22 U. Chi. L. Rev. 144, 152 (1949).

One scholar, Michael Kent Curtis, argues that Professor Raoul Berger has improperly analyzed the incorporation question by blindly following the lead of Charles Fairman and ignoring the work of William Crosskey. Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 Wake Forest L. Rev. 45 (1980). No lesser a light than Henry M. Hart, Jr., then a professor of law at Harvard Law School, remarked that "[t]he Don Quixote of Chicago breaks far too many lances in his

than Congressman Bingham. Thus, his interpretation carries much greater weight than that of Congressman Bingham. Yet, because of the circumstances under which he spoke, his statements are subject to question when held out as representative of the majority viewpoint. By sheer chance Senator Howard acted as spokesman for the joint committee when explaining the purpose of the fourteenth amendment to the Senate. The joint committee had been chaired by Senator Fessenden. Chairman Fessenden became sick suddenly and Senator Howard thus became the spokesman for the Joint Committee. "Up to this point [Senator Howard's] participation in the debates on the Civil Rights Bill and the several aspects of the Amendment had been negligible. Poles removed from Chairman Fessenden, who 'abhorred' extreme radicals, Howard . . . was 'one of the most . . . reckless of the radicals,' who had 'served consistently in the vanguard of the extreme Negrophiles.'" Professor Rauol Berger notes with some sarcasm that it is odd that a radical such as Senator

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on-slaughts upon the windmills of constitutional history to permit detailed review of each adventure." Hart, Book Review, 67 Harv. L. Rev. 1456 (1954). While the comment was, strictly speaking, directed to a recently released book by Professor Crosskey, the thrust of the comment holds true for the scholarship of Professor Crosskey. Professor Henry Hart had little use for the typical analytical method employed by Professor Crosskey: slanderous, *ad hominem* attacks on those historical actors who supported views contrary to those which Professor Crosskey expected to find in a historical record. Professor Hart compared Professor Crosskey to Senator Joseph McCarthy from Wisconsin. *Id.* at 1475 ("In the true hit-and-run style popularized by the Senator from the adjacent state to the north, [Wisconsin being north of Illinois] Professor Crosskey, having made th[e] ugly charge [that James Madison deliberately, not inadvertently, falsified some of his notes in 1836 to suit his own purposes at that time], promises to consider in a later volume whether it is true.") Professor Hart is of the general opinion that the scholarship of Professor Crosskey amounted to little more than "a confident tone, nice printing, and an abundance of notes and appendices referring to obscure documents and esoteric word meanings." *Id.* at 1486.

Howard should be taken as speaking authoritatively for a committee in which the conservatives outnumbered the radicals and where there was a strong difference of opinion between the radicals and the conservatives. R. Berger, *supra* note 26, at 147.[29]

On May 23, 1866, Senator Howard rose in the Senate, referred to the illness of Fessenden, and stated that he would "present 'the views and the motives which influenced the committee, so far as I understand [them].' After reading the privileges and immunities listed in *Corfield v. Coryell*, [6 Fed. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823),] he said, 'to these privileges and immunities . . . should be added the personal rights guaranteed and secured by the first eight amendments.' That is the sum and substance of Howard's contribution to the 'incorporation' issue." [30]

Raoul Berger notes in his analysis of the incorporation question that the remark of Senator Howard was tucked away in the middle of a long speech, that Howard was a last minute substitution for the majority chairman, that Howard was in the minority on the committee, and that after Howard was through speaking Senator Poland stated that the fourteenth amendment secured nothing beyond what was intended in the original privileges and immunities clause of Article IV Section 2. R. Berger, *supra* note 26, 148-49. Senator Doolittle followed Senator Poland with some additional remarks which were designed to reassure those whose votes had already been won in favor of passage of the fourteenth amendment that indeed the amendment was limited to known objectives, which objectives were not intended to encompass the federal Bill of Rights.

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[29] R. Berger, *supra* note 26, at 147 (footnotes omitted).

[30] R. Berger, *supra* note 26, at 147-48 (quoting *Congressional Globe* 2764-65).

The scholarly analysis of Professors Fairman and Berger persuasively show that Mr. Justice Black misread the congressional debate surrounding the passage of the fourteenth amendment when he concluded that Congress intended to incorporate the federal Bill of Rights against the states. *See infra* p. 42-44 (discussion of Blaine Amendment). So far as Congress was concerned, after the passage of the fourteenth amendment the states were free to establish one Christian religion over another in the exercise of their prerogative to control the establishment of religions.

2. *Popular Understanding*

An examination of popular sentiment across the country reveals that the nation as a whole did not understand the adoption of the fourteenth amendment to incorporate the federal Bill of Rights against the states. Inferentially, that is to say that the people understood that each state was free to continue to support one Christian religion over another as the people of that state saw fit to do. The leading constitutional scholar upon whom Justice Black relied in *Adamson v. California.*

> Mr. Flack[,] examined a considerable number of Northern newspapers and reported (an admission against the thesis he was defending) the following observation: "There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not . . . ." Presumably this excluded the press reports of May 24 on Senator Howard's speech of the 23d: for the *New York Herald* and the *New York Times*, which Mr. Flack had before him, did quote in full the passage where it said that the personal rights guaranteed by the first eight amendments were among the "privileges and immunities."
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> Other newspaper files have been examined in preparing the [article of Professor Fairman] and no

> instance has been found to vary what has been set out above.

Fairman, *supra* note 25, at 68 (footnotes omitted).[31]

Charles Fairman quotes at length from the campaign speeches of five senators who, presumably, heard Senator Howard's speech of May 23, 1866. Not one of the senators mentioned anything about the Bill of Rights when commenting to the electorate about Section 1. Likewise, the five Republicans, including Congressman Bingham, never mentioned that the privileges and immunities clause would impose the federal Bill of Rights upon the states. Along with Professor Fairman, the Court takes the historical record to conclusively show that the general understanding of the nation at large, as illustrated by contemporaneous newspaper reports, demonstrates that the people of this country did not understand the fourteenth amendment to incorporate the establishment clause of the first amendment against the states.

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[31] Crosskey, *Charles Fairman, "'Legislative History'" and the Constitutional Limitations on State Authority*, 22 U. Chi. L. Rev. 1 (1954). In particular, Professor Crosskey is critical of the newspaper examination conducted by Professor Fairman. By Crosskey's count, Fairman and Flack together examined ten newspapers. *Id.* at 100-101. Crosskey points out that there were nearly 5,000 newspapers in circulation in 1870. Thus, if Flack and Fairman examined only ten of these newspapers then, concludes Crosskey, the two ignored a substantial source of evidence in their inquiry. Certainly, at the least, according to Crosskey, neither Flack nor Fairman are entitled to make any conclusions about what the newspapers of the day reflected as the popular understanding of the effect of the fourteenth amendment.

The Court has studied the Crosskey criticism of Professor Fairman and rejects it. The work of the two scholars serves as the cornerstone for both camps in the debate vel non whether the fourteenth amendment was intended to incorporate the federal Bill of Rights. *Compare* R. Berger, *supra* note 26, 134-156 (rejecting incorporation of the federal Bill of Rights) *with* Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 Wake Forest L. Rev. 45 (1980) (following Crosskey).

3. *Campaign Speeches*

After the submission of the fourteenth amendment to the states on June 16, 1866 the members of the Thirty-ninth Congress began to busy themselves with the prospect of re-election in the fall. The statements which the members of Congress made during their campaign speeches are certainly relevant in ascertaining the intent of the Thirty-ninth Congress with regard to the scope and effect of the fourteenth amendment. All of these speeches were contemporaneous expressions of the intent of Congress. Professor Fairman provides many instances of speeches made on the campaign hustings. *See generally*, Fairman, *supra* note 25, at 68-78. None of the members of Congress indicated in their campaign speeches that the fourteenth amendment was intended to incorporate the federal Bill of Rights against the states. The general consensus with regard to the effect of the fourteenth amendment was that it covered the same ground as the Civil Rights Act of 1866. *Id.* at 72 (remarks of Senator Lyman Trumbull, the sponsor of the Civil Rights Bill).

4. *State-Legislative Debates*

The fourteenth amendment was submitted to the states for their ratification on June 16, 1866. By June, 1867, twelve legislatures had ratified the amendment. By July 28, 1868 the fourteenth amendment had been promulgated.

Professor Fairman combed the relevant legislative materials to see exactly what each state legislature thought the effect of the fourteenth amendment would be. Along with Fairman, the Court finds it important to note not only what was said but what was not said. Had the fourteenth amendment been understood to incorporate the federal Bill of Rights against the states in many instances states would have been required to make radical changes. For instance, it was frequent in many states for people to be prosecuted for felonies without an indictment from a grand jury. It was equally common for a jury of

less than twelve people to sit in judgment in a felony prosecution. Some states failed to preserve the right to a jury trial and suits at common law where the amount in controversy exceeded $20.00.

The Court will not repeat Professor Fairman's analysis in each state. Only a few states need to be highlighted to convey the popular understanding of the effect of the fourteenth amendment upon the right of states to establish a religion. In New Hampshire, only five months after the promulgation of the fourteenth amendment—in December, 1868—the Supreme Court of New Hampshire had occasion to interpret a provision of the state constitution which provided that the legislature could "authorize towns, parishes, and religious societies 'to make adequate provision . . . for the support and maintenance of public Protestant teachers of piety, religion, and morality.'" [32] Moreover, Article VI of the Bill of Rights from the New Hampshire Constitution encouraged "the public worship of the diety . . . ." The question before the Supreme Court of New Hampshire was whether certain parishioners of the First Unitarian Society of Christians in Dover could fire the preacher. The preacher had begun using text from Emerson interchangably with text from the Bible. While Wardens of the church supported the preacher, certain pew owners were outraged. The pew owners sought an injunction restraining the preacher from occupying the meeting house. The trial court granted relief.

On appeal, in a 276-page report neither the opinion of the court nor the dissent made a single reference to the fourteenth amendment. Both opinions, however, had much to say about New Hampshire's policy in ecclesiastical matters. The opinion of the court referred to the first amendment and quoted Story's *Commentaries*:

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[32] C. Fairman, *supra* note 25 at 86 (quoting N.H. Const. art. 6 (1793)).

> [T]he whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions . . . .
>
> Probably at the time of the adoption of the constitution of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as not incompatible with the private rights of conscience and the freedom of religious worship.

Fairman, *supra* note 25, 87 (citations omitted).

As Professor Fairman notes: "[I]n December 1868—five months after the promulgation of the Fourteenth Amendment—the New Hampshire court regarded the matter of an establishment of religion as being still 'left exclusively to the State governments.'" *Id.*

The historical record shows without equivocation that none of the states envisioned the fourteenth amendment as applying the federal Bill of Rights against them though the fourteenth amendment. It is sufficient for purposes of this case for the Court to recognize, and the Court does so recognize, that the fourteenth amendment did not incorporate the establishment clause of the first amendment against the states.[33]

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[33] It is always difficult to wade through the mass of historical research which has been done on both sides of the issue. For instance, while the defendant-intervenors introduced Professor Robert L. Cord's book, *Separation of Church and State: Historical Fact and Current Fiction* in support of the historical record upon which they are relying, Professor Cord concludes, in part, that a) the fourteenth amendment did incorporate the establishment clause against the states, *id.* at 101, and b) the Lord's Prayer, being distinctly Christian in character, or any other prayer which is readily identified with one religion rather than another is impermissible under the establishment clause, *id.* at 162-65.

The Court rejects the conclusion of Professor Cord that the fourteenth amendment incorporated the establishment clause

5. *Supreme Court Decisions*

Decisions by the United States Supreme Court rendered contemporaneously with the ratification of the fourteenth amendment indicate that the Court did not perceive the fourteenth amendment to incorporate the federal Bill of Rights against the states. In *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (U.S. 1869), the Supreme Court held that the fifth and sixth amendments of the Constitution do not apply to the states. This holding was consistent with the earlier, well-known holding in *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833).

In *Barron v. Baltimore* the question presented to the court was whether the City of Baltimore was required to compensate Barron under the fifth amendment for the taking of his property for public purposes. When the City of Baltimore paved some streets, streams of water had been diverted in the vicinity of Barron's wharf. The water had deposited large amounts of sand around the wharf. The sand deposits made these waters too shallow for ocean-going ships to load and unload cargo at the wharf. Chief Justice John Marshal held that Barron's claim raised no appropriate federal question because the fifth amendment was a constitutional limitation applied only against the federal government.[34]

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against the states. Professor Cord uncritically adopted the analysis of the United States Supreme Court in reaching his conclusion. In only a footnote does Professor Cord refer to the scholarship of Professor Charles Fairman; then only does Professor Cord note that there has been some "controversy" surrounding the incorporation issue.

Assuming arguendo that the establishment clause had been incorporated against the states then Professor Cord would be correct in his conclusion that any activity which is religiously identifiable would be barred. *See infra* note 41 for the Court's discussion regarding secular humanism.

[34] In Barron v. City of Baltimore the Court noted:

> But it is universally understood, it is a part of the history of the day, that the great revolution which established the

Another decision of the United States Supreme Court, decided in 1870, recognized that the federal Bill of Rights did not control the states.[35] After much deliberation over the question whether jury findings made in the state court were reviewable in federal court, the Supreme Court noted that it was "admitted" that the limitations of the seventh amendment[36] did not apply to the states.

7. *Blaine Amendment*

The discussion up to this point has focused upon the incorporation of the federal Bill of Rights generally through the fourteenth amendment. Events which post-dated the adoption of the fourteenth amendment show

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Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

In compliance with a sentiment thus generally expressed, the quiet fears were thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. *These amendments contained no expression indicating an intention to apply them to the state governments.* This court cannot so apply them.

Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1883) (emphasis added).

[35] Justices of the Supreme Court of New York v. United States, 65 U.S. (9 Wall.) 274 (1870).

[36] In part the seventh amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

that the lawmakers of the Thirty-ninth Congress did not intend that the establishment clause would become binding upon the states with the ratification of the fourteenth amendment. "'[A] conclusive argument against the incorporation theory, at least as respects the religious provisions of the First Amendment, is the "Blaine Amendment" proposed in 1875." McClellan, *Christianity and the Common Law*, in Joseph Story and the American Constitution 118, 154 (1971) (quoting O'Brien, *Justice Reed and the First Amendment*, 116 (n.d.)). At the behest of President Grant, James Blaine of Maine introduced a resolution in the Senate in 1885 which read: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." *Id.* at 154. (emphasis in original). Importantly, the Congress which considered the Blaine Amendment included twenty-three members of the Thirty-ninth Congress, the Congress which passed the fourteenth amendment.

> Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. Congressman Banks, a member of the Twenty-Ninth Congress, observed: "If the Constitution is amended so as to secure the object embraced in the principle part of this proposed amendment, it prohibits the States from exercising a power they now exercise." Senator Frelinghuysen of New Jersey urged the passage of the "House article," which "prohibits the States for the first time, from the establishment of religion, from prohibiting its free exercise." Senator Stevenson, in opposing the proposed amendment, referred to *Thomas Jefferson: "Friend as he* [Jefferson] *was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a government of limited authority, a mere agent of the States with prescribed powers,*

> *should undertake to take possession of their schools and of their* religion." Remarks of Randolph, Christiancy, Kernan, Whyte, Bogy, Easton, and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.

Id. (quoting O'Brien, *Justice Reed and the First Amendment* 116-17 (emphasis added)).

The Blaine Amendment, which failed in passage, is stark testimony to the fact that the adoptors of the fourteenth amendment never intended to incorporate the establishment clause of the first amendment against the states, a fact which Black ignored. This was understood by nearly all involved with the Thirty-ninth Congress to be the effect of the fourteenth amendment.

G. *Proper Interpretative Prospective*

The interpretation of the Constitution can be approached from two vantages. First, the Court can attempt to ascertain the intent of the adoptors, and after ascertaining that attempt apply the Constitution as the adoptors intended it to be applied. Second, the Court can treat the Constitution as a living document, chameleon-like in its complexion, which changes to suit the needs of the times and the whims of the interpreters. In the opinion of this Court, the only proper approach is to interpret the Constitution as its drafters and adoptors intended. The Constitution is, after all, the supreme law of the land. It contains provisions for amending it; if the country as a whole decided that the present text of the Constitution no longer satisfied contemporary needs then the only constitutional course is to amend the Constitution by following its formal, mandated procedures. Amendment through judicial fiat is both unconstitutional and illegal. Amendment through judicial fiat breeds disrespect for the law, and it undermines the very basic notion that this country is governed by laws and not by men. *See gen-*

erally Breast, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204 (1980) (discussing various approaches to constitutional interpretation).

Let us have faith in the rightness of our charter and the patience to perservere in adhering to its principles. If we do so then all will have input into change and not just a few.

H. *Stare Decisis*

What is a court to do when faced with a direct challenge to settled precedent? [37] In most types of cases "it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 385 U.S. 393, 406 (1932) (Brandeis, J., dissenting). This general rule holds even where the court is persuaded that it has made a serious error of interpretation in cases involving a statute.[38] However, in cases involving the federal constitution, where correction through legislative action is practically impossible, a court should be willing to examine earlier precedent and to overrule it if the court is persuaded that the earlier

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[37] Abraham Lincoln once said, " 'Stand with anybody that stands *right*. Stand with him while he is right and *part* with him when he does wrong.' " Jaffa, *In Defense of Political Philosophy*, 34 National Review 36 (1982) (emphasis in original).

[38] While stare decisis has more force in cases which determine the meaning of statutes as opposed to interpretating the Constitution, the Supreme Court has frequently reversed itself where it thinks an earlier decision involving the construction of a statute is in error. In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Supreme Court identified four factors which it considers when faced with the question whether to overrule a prior decision which involves a statute. The factors are: 1) whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history; 2) whether overruling the decisions would be inconsistent with more recent expressions of congressional intent; 3) whether the decisions in question constituted a departure from prior decisions; and 4) whether overruling these decisions would frustrate legislative reliance on there holdings. *Id.* at 695-701.

precedent was wrongly decided. *Id.* at 407. "A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

Certainty in the law is important. Yet, a rigid adherence to stare decisis "would leave the resolution of every issue in constitutional law permanently at the mercy of the first Court to face the issue, without regard to the possibility that the relevant case was poorly prepared or that the judgment of the Court was simply ill-considered. The danger is particularly great where the court has moved too far in an activist direction; in such a situation, legislative correction of the error is liable to be virtually impossible." *Maltz, Commentary: Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 476, 492 (1980).

> [T]he 'wall of separation between Church and State' that Mr. Jefferson built at the University [of Virginia] which he founded did not exclude religious education from the school. The difference between the generality of his statements on the separation of Church and State and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

McCollum v. Board of Education, 333 U.S. 203, 247 (1948) (per Reed, J., dissenting).

"[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring). "By placing a premium on 'recent cases' rather than the language of the Constitution, the Court makes it dangerously simple for future Courts using the technique of interpretation to operate as a 'con-

tinuing Constitutional Convention.'" *Coleman v. Alabama*, 399 U.S. 1, 22-23 (1970) (Burger, C.J.). "Too much discussion of constitutional law is centered on the Court's decisions, with not enough regard for the text and history of the Constitution itself." R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 296 (1977).[39]

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[39] Mr. Justice Stevens recently addressed the problem whether a court should follow authority which it believes to have been incorrectly decided. In a case which involved the construction of a statute parents of Negro school children sued under the Civil Rights Act of 1866 (now 42 U.S.C. § 1982) for alleged discriminatory admission to private schools, which discrimination was based solely upon race. Runyon v. McCrary, 427 U.S. 160 (1976). The statute upon which the suit was based, 42 U.S.C. § 1981, was passed prior to the adoption of the fourteenth amendment. It provides in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as enjoyed by white citizens . . . ." In *Runyon* two children were denied admission to private schools in Virginia solely because they were Negro. The Supreme Court held that section 1981 prohibits private, commercially-operated, nonsectarian schools from denying admission to prospective students solely because of race. Mr. Justice Stevens concurred in the opinion of the Court, but his thoughts on stare decisis are noteworthy.

Mr. Justice Stevens felt compelled to join the opinion of the Court based upon a prior decision of the Court, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). However, the language of the Civil Rights Act of 1866 and its historical setting left "no doubt in [Mr. Justice Stevens'] mind that the construction of [42 U.S.C. § 1982] would have amazed the legislators who voted for it." Runyon v. McCrary, 427 U.S. at 189. Given a clean slate Mr. Justice Stevens would have allowed private, commercially-operated, nonsectarian schools the right to deny admission to prospective students solely because of race. He would have reached this result not because he thought that it was socially preferable to the result reached by the Supreme Court, but simply because the intent of Congress and the legislative history surrounding the adoption of 42 U.S.C. § 1981 mandated such a result.

Where Mr. Justice Stevens was unwilling to dissent from his bretheren in a case involving statutory construction, this Court feels a stronger tug from the Constitution which it has sworn to support and to defend.

This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate.

I. *Summary*

"Th[e] mountain of evidence has become so high, one may have lost sight of the few stones and pebbles that made up the theory that the Fourteenth Amendment incorporated Amendments I to VIII." Fairman, *supra* note 25, at 134. Suffice it to say that the few stones and pebbles provide precious litle historical support for the view that the states were prohibited by the establishment clause of the first amendment from establishing a religion.[40]

More than any other provision of the Constitution, the interpretation by the United States Supreme Court of the establishment clause has been steeped in history. This Court's independent review of the relevant historical documents and its reading of the scholarly analysis convinces it that the United States Supreme Court has erred in its reading of history. Perhaps this opinion will be no more than a voice crying in the wilderness and this attempt to right that which this Court is persuaded is a misreading of history will come to nothing more than blowing in the hurricane, but be that as it may, this Court is persuaded as was Hamilton that "[e]very breach of the fundamental laws, though dictated by necessity impairs the sacred reverence which ought to be

[40] Professor Fairman has summarized concisely in several pages all of the stones and pebbles which could conceivably be relied upon to support the conclusion that the fourteenth amendment intended to incorporate the federal Bill of Rights against the states. See Fairman, *supra* note 25, 134-35.

maintained in the breast of the rulers towards the constitution." R. Berger, *supra* note 26, at 299 (quoting Federalist No. 25 at 158).

Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted.

J. *Conclusion*

There are pebbles on the beach of history from which scholars and judges might attempt to support the conclusions that they are want to reach. That is what Professors Flack, Crosskey and the more modern scholars have done in attempting to establish a beachhead, as did Justice Black, that there is a basis for their conclusions that Congress and the people intended to alter the direction of the country by incorporating the first eight amendments to the Constitution. However, in arriving at this conclusion, they, and each of them, have had to revise established principles of constitutional interpretation by the judiciary. Whether the judiciary, inadvertently, or eagerly, walked into this trap is not for discussion. The result is that the judiciary has, in fact, amended the Constitution to the consternation of the republic. As Washington pointed out in his Farewell Address, *see* p. i *supra*, this clearly is the avenue by which our government can, and ultimately will, be destroyed. We think we move in the right direction today, but in so doing we are denying to the people their right to express themselves. It is not what we, the judiciary want, it is what the people want translated into law pursuant to the plan established in the Constitution as the framers intended. This is the bedrock and genius of our republic. The mantle of office gives us no power to fix the moral direction that this nation will take. When we

undertake such course we trample upon the law. In such instances the people have a right to complain. The Court loses its respect and our institution is brought low. This misdirection should be cured now before it is too late. We must give no future generation an excuse to use this same tactic to further their ends which they think proper under the then political climate as for instance as did Adolph Hitler when he used the court system to further his goals.

What is past is prologue. The framers of our Constitution fresh with recent history's teachings, knew full well the propriety of their decision to leave to the peoples of the several states the determination of matters religious. The wisdom of this decision becomes increasingly apparent as the courts wind their way through the maze they have created for themselves by amending the Constitution by judicial fiat to make the first amendment applicable to the states. Consistency no longer exists. Where you cannot recite the Lord's Prayer, you may sing his praises in God Bless America. Where you cannot post the Ten Commandments on the wall for those to read if they do choose, you can require the Pledge of Allegience. Where you cannot acknowledge the authority of the Almighty in the Regent's prayer, you can acknowledge the existence of the Almighty in singing the verses of America and Battle Hymn of the Republic. It is no wonder that the people perceive that justice is myoptic, obtuse, and janus-like.

If the appellate courts disagree with this Court in its examination of history and conclusion of constitutional interpretation thereof, then this Court will look again at the record in this case and reach conclusions which it is not now forced to reach.[41]

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[41] One of the first of these considerations is whether the teachers and those students who desire to express the simple prayers have any rights to freedom of speech. Compare what the Court observed in the order which granted the preliminary injunction in the com-

panion case, 82-0792-H, against the state on the first amendment right of students to pray at school. 544 F. Supp. at 732-33. The evidence in the case demonstrates that the school board took no active part in any decision made by the teachers to utilize the simple prayer that they have. The school board nor any of the official body of the school administration encouraged or discouraged these teachers from exercising their own will in the matter. Nor does the evidence indicate that those students who opted for this type of exercise were coerced into participating or not participating.

In dealing with matters religious the exercise of first amendment rights are highly circumscribed. The same does not appear to be true in dealing with first amendment rights in expressing one's opinions in all other matters whether they be expressions of moral concern or immoral concern.

The second major area that this Court must concern itself with should this judgment be reversed is that raised by the evidence produced by the intervenors dealing with other religious teachings now conducted in the public schools to which no attention has apparently been directed and to which objection has been lodged by the intervenors.

There are many religious efforts abounding in this country. Those who came to these shores to establish this present nation were principally governed by the Christian ethic. Other religions followed as the population grew and the ethnic backgrounds were difused. By and large, however, the Christian ethic is the predominent ethic in this nation today unless it has been supplanted by secular humanism. Delos McKown, witness for the plaintiff, expressed himself as believing that secular humanism has been more predominent through the years than we have imagined and indeed was more akin to the beliefs of George Washington, Thomas Jefferson, Benjamin Franklin, and others of that era. Delos McKown also testified that secular humanism is not a religion, though he ultimately waffled on this point. The reason that this can be important to the decision of this Court is that case law deals generally with removing the teachings of the Christian ethic from the scholastic effort but totally ignores the teaching of the secular humanist ethic. It was pointed out in the testimony that the curriculum in the public schools of Mobile County is rife with efforts at teaching or encouraging secular humanism—all without opposition from any other ethic—to such an extent that it becomes a brainwashing effort. If this Court is compelled to purge "God is great, God is good, we thank Him for our daily food" from the classroom, then this Court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a diety. Indeed, the Supreme Court in

Abington School District v. Schempp, 374 U.S. 203, 225 (1963) (quoting Zorach v. Clauson, 343 U.S. 305, 314) (1952), noted that "the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to a religion, thus preferring those who believe in no religion over those who do believe."

That secular humanism is a religion within the definition of that term which the "high wall" must exclude is supported by the finding in Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961), which recognized that secular humanism is a religion in the traditional sense of the word and also in the statement of the 276 intellectuals who advocate the doctrine of secular religion as delineated in the *Humanist Manifesto I and II.* (Defendant-intervenors exhibit #10).

Textbooks which were admitted into evidence demonstrated many examples in the way this theory of religion is advanced. The intervenors maintain that their children are being so tought and that this Court must preclude the Mobile County School Board from continuing to advance such a religion or in the alternative to allow instruction in the schools that would give a child an opportunity to compare the ethics of each religion so as to make their own credibility or value choices. To this extent, this Court is impressed that the advocacy of the intervenors on the point of necessity makes them parties plaintiff and to this extent they should be realigned as such inasmuch as both object to the teaching of certain religions.

This Court is confronted with these two additional problems that must be resolved if the appellate courts adhere to their present course of interpretating history as did Mr. Justice Black. Should this happen then this Court will hunker down to the task required by the appellate decisions. A blind adherence to Justice Black's absolutism will result in an engulfing flood of other cases addressed to the same point raised by intervenors. The Court will be called upon to determine whether each book or any statement therein advances secular humanism in a religious sense, a never-ending task. Already the involvement of this Court with determining state activities in such things as prison cases, occupies one-third of its docket. This Court can anticipate no less of a burgeoning docket brought about by this incursion into what is legitimately a state concern.

The founding fathers were far wiser than we. They were content to allow the peoples of the various states to handle these matters as they saw fit and were patient in permitting the processes of change to develop orderly by established procedure. They were not impatient to bring about a change because we think today that it is the proper course or to set about to justify by misinterpretation

III. *Order*

It is therefore ordered that the complaint in this case be dismissed with prejudice. Costs are taxed against the plaintiffs. Fed. R. Civ. P. 54(d).

DONE this 14th day of January, 1983.

/s/ W B Hand
Chief Judge

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the original intent of the framers of the Constitution. We must remember that "He, who reigns within Himself, and rules passions, desires, and fears, is more a king" Milton, *Paradise Regained*. If we, who today rule, do not follow the teachings of history then surely the very weight of what we are about will bring down the house upon our head, and the public having rightly lost respect in the integrity of the institution, will ultimately bring about its change or even its demise.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 82-0554-H

ISHMAEL JAFFREE; JAMAEL AAKKI JAFFREE, MAKEBA GREEN, and CHIOKE SALEEM JAFFREE, infants, by and through their best friend and father, ISHMAEL JAFFREE,

Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY; DAN C. ALEXANDER, DR. NORMAN BERGER, HIRAM BOSARGE, NORMAN G. COX, RUTH F. DRAGO, and DR. ROBERT GILLIARD, in their official capacities as members of the Board of School Commissioners of Mobile County; DR. ABE L. HAMMONS, in his official capacity as Superintendent of the Board of Education of Mobile County; ANNIE BELL PHILLIPS, individually and in her official capacity as principal of MORNINGSIDE ELEMENTARY SCHOOL; JULIA GREEN, individually and in her official capacity as a teacher at MORNINGSIDE ELEMENTARY SCHOOL; BETTY LEE, individually and in her official capacity as principal of E.R. DICKSON ELEMENTARY SCHOOL; CHARLENE BOYD, individually and in her official capacity as a teacher at E.R. DICKSON ELEMENTARY SCHOOL; EMMA REED, individually and in her official capacity as principal of CRAIGHEAD ELEMENTARY SCHOOL; PIXIE ALEXANDER, individually and in her official capacity as a teacher at CRAIGHEAD ELEMENTARY SCHOOL,

Defendants.

JUDGMENT

This action came on for trial before the Court, the Honorable W. B. Hand, Chief Judge, presiding, and the issues having been duly tried and a final decision having been duly rendered,

It is Ordered and Adjudged

that the plaintiffs take nothing, that the action be dismissed on the merits and that the defendants recover their costs of action.

DONE this 14th day of January, 1983.

/s/ W. B. Hand
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Nos. 82-0554-H & 82-0792-H

ISHMAEL JAFFREE, *et al.*,
Plaintiffs,

vs.

BOARD OF SCHOOL COMMISSIONERS OF
MOBILE COUNTY, *et al.*,

GEORGE C. WALLACE, *et al.*,

DOUGLAS T. SMITH, *et al.*,
Defendants & Intervenors.

INJUNCTION

As directed by the mandate of the Eleventh Circuit Court of Appeals, it is hereby ORDERED that the defendants, their agents, servants, employees, and all persons in active concert or participation with them are hereby enjoined from:

1) Enforcing Alabama Code § 16-1-20.1 (1982);

2) Enforcing Alabama Code § 16-1-20.2 (1982) (former Ala. Act 82-735); and

3) From conducting the following prayer activities:

(a) Reciting the Lord's Prayer;

(b) God is great, God is good, Let us thank Him for our food, bow our heads we all are fed, Give us Lord our daily bread. Amen.

(c) God is great, God is good. Let us thank him for our food; and

(d) For health and strength and daily food we praise Thy name, oh Lord.

The Court reserves jurisdiction for further rulings not inconsistent with the opinion of the Court heretofore entered.

DONE this 14th day of October, 1983.

/s/ W. B. Hand
Chief Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-663

ISHMAEL JAFFREE, *et al.*,
Applicants,
v.
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the judgments of the United States District Court for the Southern District of Alabama, Civil Action Numbers 82-0792-H and 82-0554-H, dismissing the actions, dissolving the injunction previously entered, and taxing costs against plaintiffs be, and the same hereby are, stayed pending receipt of responses and further order of the undersigned or of the Court.

/s/ Lewis F. Powell
Associate Justice of the
Supreme Court of the
United States

Dated this 2nd day February, 1983.

A true copy
ALEXANDER L. STEVAS
Test:
Clerk of the Supreme Court of the
United States
Certified this 2nd day of February, 1983

By /s/ Francis J. Lorton
Chief Deputy

SUPREME COURT OF THE UNITED STATES

No. A-663

ISHMAEL JAFFREE, *et al.*,
Applicants,

v.

BOARD OF SCHOOL COMMISSIONERS OF
MOBILE COUNTY, *et al.*

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the applicants and the responses filed thereto,

IT IS ORDERED that the judgments of the United States District Court for the Southern District of Alabama, Civil Action Numbers 82-0792-H and 82-0554-H, dismissing the actions, dissolving the injunction previously entered, and taxing costs against plaintiffs be, and the same hereby are, stayed pending final disposition of the appeal before the United States Court of Appeals for the Eleventh Circuit.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 11th day of February, 1983.

SUPREME COURT OF THE UNITED STATES

No. A-663

ISHMAEL JAFFREE, *et al.*,
Applicants,
v.
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*

ON APPLICATION FOR STAY

[February 11, 1983]

JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of the United States District Court for the Southern District of Alabama pending an appeal to the United States Court of Appeals for the Eleventh Circuit. Applicant Ishmael Jaffree is the father of minor applicants Jamael Aakki Jaffree, Makeba Green, and Chioke Saleem Jaffree, three students in the Mobile County, Alabama public schools. Respondents are various school and state officials. The application was filed here on February 2. In my capacity as Circuit Justice, I entered an order staying the judgment of the District Court until respondents were afforded an opportunity to respond. Their responses are now in hand, and I have considered the merits of the application for a stay.

The situation, quite briefly, is as follows: Beginning in the fall of 1981, teachers in the minor applicants' schools conducted prayers in their regular classes, including group recitations of the Lord's Prayer. At the time, an Alabama statute provided for a one-minute period of

silence "for meditation or voluntary prayer" at the commencement of each day's classes in the public elementary schools. Ala. Code § 16-1-20.1 (Supp. 1982). In 1982, Alabama enacted a statute permitting public school teachers to lead their classes in prayer. 1982 Ala. Acts 735.

Applicants, objecting to prayer in the public schools, filed suit to enjoin the activities. They later amended their complaint to challenge the applicable state statutes. After a hearing, the District Court granted a preliminary injunction. *Jaffree* v. *James*, 544 F. Supp. 727 (1982). It recognized that it was bound by the decisions of this Court, *id.*, at 731, and that under those decisions it was "obligated to enjoin the enforcement" of the statutes, *id.*, at 733.

In its subsequent decision on the merits, however, the District Court reached a different conclusion. *Jaffree* v. *Board of School Commissioners of Mobile County*, —— F. Supp. —— (1983). It again recognized that the prayers at issue, given in public school classes and led by teachers, were violative of the Establishment Clause of the First Amendment as that clause has been construed by this Court. The District Court nevertheless ruled "that the United States Supreme Court has erred." *Id.*, at ——. It therefore dismissed the complaint and dissolved the injunction.

There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions. In *Engel* v. *Vitale*, 370 U.S. 421 (1962), the Court held that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits a State from authorizing prayer in the public schools. The following Term, in *Murray* v. *Curlett*, decided with *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), the

Court explicitly invalidated a school district's rule providing for the reading of the Lord's Prayer as part of a school's opening exercises, despite the fact that participation in those exercises was voluntary.

Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them. Similarly, my own authority as Circuit Justice is limited by controlling decisions of the full Court. Accordingly, I am compelled to grant the requested stay.

It is so ordered.

APPENDIX F

Bobby and Emily Cook, Thomas and Sibyll Bends, Linda Drashman, Mrs. Steve Cooper, Joanne DeBenedetto, Bill Flowers, Vonna Tuberville, Mrs. Ralph O. Kelly, Joel C. Kelley, Lamar Guyton, Mrs. Abbie D. Tamblyn, Joseph R. Thompson, Bill Norton, Wayne Ward, Faye R. Sellers, Billie Jack Mitchell, Sr., Glenn Wiley, Tom Jones, James M. Dodd, Jr., Judith R. Dodd, William Glen Byron, Bobby Schiferly, Mr. and Mrs. A. W. Lawrence, Eva Hendrix, Dorothy K. Chancy, Ed and Carol Lietz, Cindy Elliott, G. N. Burrows, Paul J. Reid, John V. Hendrix, Julia A. Reib, Mary Taylor, Rev. and Mrs. Joseph L. Garlington, R. Bruce Vandiver, Mrs. R. Bruce Vandiver, Mrs. R. F. Wallace, Mrs. Moya Wells, Mr. Larry Wells, Wanda Brooks, Jerry Brooks, Ronald Glaze, Myra Thompson, Betsy Miller, Barbara Williams, Jack Christensen, Donald E. Thompson, Sonja Thompson, Jacqueline R. Peters, Michael J. Puckett, A. Rodney Applegate, Jr., J. E. Solomon, Virginia Stonestreet, Marti Pulliam, Jimmy Jones, Marie Woodham, Susan S. Hahn, Tim McGraw, Charles R. Smith, Mr. and Mrs. Jefferson C. McGee, George E. Fisher, Chris Evans, Don Sissons, Georgia McCarge, David Fowler, Debra Fowler, Christine Walker, Francis Sissions, Jill Fletcher, Eileen H. Rodgers, Shelby A. Sutton, Mr. and Mrs. Ronnie Connell, Mr. and Mrs. A. B. Grantham, Mr. and Mrs. Douglas W. Estis, Eva Ross, Joyce Harlow, V. D. Morgan, Veronica Morgan, Aleene Renould, Meloney Atkins, Mr. and Mrs. Jimmy T. Jones, Mr. and Mrs. Tom D. Avants, Claud O. Renould, Mr. and Mrs. W. C. Clark, C. David Jones, Albert E. Godwin, Mrs. Walter E. Phillips, Mrs. Myra Chestnut, Mr. and Mrs. Robert E. Emanuel, Virginia Jones, Sherly D. Bargainier, M. M. Bargainier, III, Patsy A. Fisher, John Sellers, Mrs. Mary C. Mitchel, Sr., Connie Robinson, Mrs. Barbara W. Manning, Mr. David B. Price-Williams, Mr. and Mrs. Curtis E. Greer, Mrs. Nikki Nolfe, Mrs. Beverly Williams, Mrs. O. L. Ezel, Mary McDonald, Mrs. Helen Davis, Mrs. John R.

Calvin, Catherine Fowler, Dr. Ais deSweza, Jim Gleisberg, Marlene Vining, Leo Fox, Tom Booth, Mr. and Mrs. M. C. Solomon, J. Frank Nicholas, Mr. and Mrs. John Webster, Lee Wiley, Mr. and Mrs. Ray Thomas, Blanche Cannon, Doris Cannon, Judy Merryman, Wanda Shoultz, Philip and Sherry Waite, Trudy Cunningham, Bob Hudson, Dorothy Cole, Ann Mitchell, Wilbur Goforth, Arthur Walker, Cecil E. Yarborough, James E. Eubanks, Donald R. Rundell, David Hornell, Mr. and Mrs. Melvin Badon, Debra Leigh Penton, Betty Shinoult, Brenda King, Mark and Tene Hickey, Bobby Daugette, Joseph E. Shumock, Tommy Anderson, William G. Wolfe, Mrs. A. D. Greer, Mr. and Mrs. Roger Dale Behurst, George and Peg Freeman, D. D. Barton, Jr., Judy Barton, James Gordon Powell, Laura Ann Powell, Michael J. Wright, Mrs. James Burt, Mr. and Mrs. Edward J. Thierry, Mr. and Mrs. Mike Coleson, Mr. and Mrs. Charles Hillman, Mr. and Mrs. Stephen C. Hudson, Helen Wagner, Billy J. Watford, Terry C. Plauche, Elsie Morgan, Mr. and Mrs. C. F. Lewis, Freddie B. Everett, W. L. Bradley, Joan E. Speed, John O. Warren, Sr., Mrs. Dorothy Buflock, Mrs. Shirley Jones, Barbara Robinson, J. C. McGee, Mrs. Darlene Robinson, Fred T. Beach, Jr., R. E. Ogletree, Edward W. Jones, Jr., Charlotte Smith, John E. Sims, James M. Brown, Mary Nell Newell, Calvin Lowder, Naomi R. Pierce, Pat Shiver, Jeanette Harper, Gary A. Greenough, Donald F. Williams, Margaret Trountain, Connie Brown, June McDaniel, Judy Neese, John Shivers, William D. Ralph, Fran Greenough, Jim Chestnut, Sr., Gail Walker, Rev. Robert L. McKenzie, Ronald and Ruth Walker, H. Bennie Orr, Jim and Jane Garner, Bill and Teri Stewart, Fred and Ann Browne, Reba Henage, James Henage, Bonnie Henage, James L. Davis, Jr., Michael and De Simpson, Mrs. Ann Smith, Mrs. Valrea Cox, Mrs. Raye Hanks, Robert B. Hanks, Reta Pool, Donna H. Day, Virginia B. Schizerlz, Mr. and Mrs. Edgar J. Spress, Charles M. Weston, Connie Walton, Valerie Boatright, Clem Boatright, Donna Ferrell, Debbie

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No. 83-804

IN THE

Supreme Court Of The United States

October Term, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, *et al.*,
Petitioners

v.

ISHMAEL JAFFREE, *et al.*,
Respondents

DOUGLAS T. SMITH, *et al.*,
Plaintiffs-Intervenor

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RONNIE L. WILLIAMS
Counsel of Record

103 Dauphin Street
Suite 401
Mobile, Alabama 36602
(205) 432-6985

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No. 83-804

IN THE

Supreme Court Of The United States

October Term, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, *et al.*,
Petitioners

v.

ISHMAEL JAFFREE, *et al.*,
Respondents

DOUGLAS T. SMITH, *et al.*,
Plaintiffs-Intervenor

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

This is on a petition for certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit reversing the district court and holding certain state sponsored prayer exercises violative of the Establish-

ment Clause of the First Amendment to the U.S. Constitution.[1]

The controversy began at the start of the 1981-82 school year when Respondent Chioke Saleem Jaffree (then age 5) advised his teacher, Petitioner Charlene Boyd, that he did not want to participate in prayer exercises. Tr. at 111. Notwithstanding his protestations, Chioke was required to remain in the classroom during these afternoon exercises. Id. On March 5, 1982, Ms. Boyd was advised by Chioke's father, Respondent Ishmael Jaffree, during a parent-teacher conference, that he did not want his son exposed to religious exercises, and that in his opinion the exercises were unconstitutional. *Jaffree v. Board of School Commissioners*, 554 F.Supp. 1104, 1107 (S.D. Ala. 1983). Mr. Jaffree followed this conference with a handwritten letter to Ms. Boyd, dated March 11, 1982, again reminding her that leading her class in religious exercises was unlawful. Id.

Mr. Jaffree's other children, Makeba Green and Jamael Aakki Jaffree, made no formal objection to their teachers concerning their prayer practices. Tr. at 74 and 195. However, they did complain to their father, and on May 10, 1982, he sent a letter to school Superintendent Abe Hammons complaining about the prayer exercises being advanced in his children's schools. Despite Mr. Jaffree's protestations, the prayers continued.[2] *Jaffree v. Board of School Commissioners, supra* at 1107.

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[1]The religious exercise at issue were the daily recitation of the Lord's Prayer and the following three prayers:

(1) God is great, God is good, Let us thank Him for our food, bow our heads we all are fed, Give us Lord our daily bread. Amen.

(2) God is great, God is good, Let us thank Him for our food.

(3) For health and strength and daily food we praise Thy name, oh Lord.

Jaffree v. Wallace, 705 F.2d 1526, 1528 (11th Cir. 1983).

[2]The district court in its Findings of Fact found that after learning of Mr. Jaffree's concern over prayer exercises in their schools, petitioners

School attendance in Alabama is required by state law. Ala. Code Section 16-28-3 (1975).

On May 28, 1982, Mr. Jaffree, on behalf of three of his minor children, filed suit in the U.S. District Court seeking principally declaratory and injunctive relief against three teachers and various county school officials, who regularly sponsored or permitted the sponsoring of verbal classroom prayer. After learning that Bible reading over the school public address system and various other prayer practices were daily occurrences throughout the school system,[3] Mr. Jaffree amended his complaint to allege class claims.

On January 14, 1983, after a four day trial on the merits, the district court issued a Memorandum Opinion and Order dismissing this case for want of jurisdiction. R. at 443-512.[4]

After making an "independent review" of the relevant historical documents and reviewing the works of principally two historians, the district court concluded that "the

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Reed and Phillips consulted with the teachers involved but made no effort to instruct them to discontinue the practice. Id. at 1108.

[3]Though these facts were elicited from Mr. Jaffree on direct examination and would generally be regarded as hearsay, no objection was raised nor did petitioners offer rebuttal testimony. Tr. at 225. Additionally, Respondents offered to put on testimony supporting Mr. Jaffree's contentions but this testimony was objected to and sustained by the Court. Tr. at 167-70 and 287-90. The trial court denied Respondents' request to proffer, for appeal purposes, this testimony. Tr. at 169 and 290.

[4]At no time prior to, during or subsequent to the trial did the trial judge indicate an interest in reviewing the legislative history of the First and Fourteenth Amendment. In fact, the trial judge recognized in his August 9, 1982 Preliminary Injunction Order that it is settled law that the Establishment Clause reaches school prayer practices, and that the Fourteenth Amendment rendered the First Amendment applicable to the states. *Jaffree v. James*, 544 F.Supp. 727, 729 (S.D. Ala. 1982).

Considering how well settled the reach of the First Amendment and its applicability to the state via the Fourteenth Amendments, respondents felt no need, nor were they put on notice to introduce evidence on legislative intent.

United States Supreme Court has erred in its reading of history". Id. at 1128. In reversing a long line of this Court's precedents the district court stated:

> "This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate. . . .
>
> Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted." Id. at 1128.

The Eleventh Circuit Court of Appeals reversed the decision of the district court, found the prayer practices unconstitutional and remanded with instructions for the lower court to enter an appropriate order. *Jaffree v. Wallace,* 705 F.2d 1526 (11th Cir. 1983).

Petitioners' Petition for Rehearing and Rehearing En Banc was denied. *Jaffree v. Wallace,* 713 F.2d 614 (11th Cir. 1983).

REASONS FOR DENYING THE WRIT

This case presents no substantial questions worthy of review. In the companion case of *Wallace v. Jaffree,* No. 83-812 (October Term, 1983), appellants assert:

> "This case would have merited a mere summary affirmance if the U.S. District Judge, Judge Brevard Hand, had not held a whole line of this Court's cases unconstitutional".[5]

[5]See Appellants' Jurisdictional Statement Brief at 5.

On the contrary, it is precisely because the district court overruled established precedent of this Court that the Court should not send the wrong signal by granting the Writ. Neither potential litigants nor lower courts should be encouraged to disregard this Court's reading of history and legislative intent interpreting our Constitution. There will always be legal scholars and historians who will disagree with this Court's interpretation of a constitutional provision. Certainty in the law compels that this Court, not a district court judge, be the ultimate authority on what our Constitution provides.

The Petitioners postulate two theories in support of their assertion that substantial questions are presented for review. First, petitioners claim that this Court's school prayer precedents do not control the teacher initiated prayers at issue in the present case. Second, this Court's Establishment Clause cases were founded upon an incorrect legal analysis of the Constitution, whereby this Court "assumed powers which were not given to it by the Constitution."[6] Both of Petitioners' arguments are so utterly lacking in merit as to warrant no further review.

ARGUMENT

A. Petitioners' First Question, Which is Premised on a Practice vs. Law Dichotomy, Raises no Issues Which Have Not Been Clearly Resolved by This Court.

Petitioners' first question for review is:

> Whether the Judgment of the United States Court of Appeals for the Eleventh Circuit, which overturned the judgment of the United States District Court for the Southern District of Alabama should be reversed

---

[6]Petition For A Writ of Certiorari at 15.

and the judgment of the district court should be reinstated.

It is best to start with a statement of what this case is not about. This is not a case where an individual student or group of students absent state persuasion are attempting to offer prayers prior to mealtime.[7] Nor does this case involve prayers offered at a student assembly by student council members.[8] Nor is the use of school facilities before, during, or subsequent to the school day for religious purposes at issue here.[9] Neither does the case involve an opt-in classroom prayer priviso found unconstitutional in *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), aff'd, 455 U.S. 913 (1982).

Petitioners argue that "this is an unusual case and none of the authorities cited by the Plaintiffs-Respondents address a fact situation at all similar to the present case."[10] This argument is premised on the assertion that "the religious activities in which the teachers and students were engaged were purely voluntary with no directives, for or against, from the State of Alabama or the Board of School Commissioners."[11]

Even if Petitioners' statement of the facts were correct[12] they would provide no defense to an Establishment Clause

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[7]*Stein v. Oshinsky*, 348 F.2d 999 (2nd Cir. 1968) *cert. denied* 382 U.S. 957.

[8]*Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863.

[9]*Lubbock v. Lubbock*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 800 (1983).

[10]Petition for a Writ of Certiorari at 14.

[11]Id. at 14-15.

[12]None of the teachers advised parents about the prayer exercises, nor informed them that their children could be removed from the classroom. See Green, Boyd and Pixie Alexander's Depos. at 32, 29, and 23, respectively. In fact, Ms. Boyd, with knowledge of Chioke's protestations, failed to remove him from the class during these exercises. See page 1 of this Brief.

violation. Petitioners' reading of the scope of this Court's opinion in *School District of Abington Township, Pa. v. Schempp,* 374 U.S. 203 (1963) is far too limited. In *Schempp,* this Court held both the *practices* at issue, and the *laws* requiring them, were unconstitutional. 374 U.S. at 205. The *Schempp* case was consolidated with *Murray v. Curlett,* 374 U.S. 203 (1963), and both were decided together. The *Murray* case involved no state statute or mandated school board policy. The petitioners in *Murray* were challenging the *practice* of daily Bible reading and the recitation of the Lord's Prayer—morning exercises intended to advance the Christian religion.[13]

Judge Hatchett, speaking for the majority in *Jaffree v. Wallace, supra,* recognized the fallacy of Petitioners' practice vs. law argument. "If a statute authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional." Id. at 1534. This reasoning is in line with Justice Douglas' concurrence in *Schempp, supra,* where he admonished that what may not be done directly may not be done indirectly less the Establishment Clause becomes a mockery. 374 U.S. at 230.

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[13]Petitioners are patently wrong in asserting: "In all of the plaintiffs' cited cases the court was presented with religious activity generated by state enactments." Petition for a Writ of Certiorari at 15. Jaffree's brief before the Eleventh Circuit cited the following cases which involved no state enactment. *Despain v. Dekalb County Community School Dist.,* 384 F.2d 836 (7th Cir. 1967), (at issue were the teachers' use of a grace with the word "God" removed); *Hall v. Bd. of School Com'rs of Conecuh County,* 656 F.2d 999 (5th Cir. 1981), (case involving Bible reading over the school public address system); *Collins v. Chandler Unified School Dist.,* 644 F.2d 759 (9th Cir. 1981) *cert. denied,* 454 U.S. 863, (case involved prayers initiated by student council members); *Metzer v. Bd. of Public Instruction of Orange Cty.,* 548 F.2d 559 (5th Cir. 1977), *cert. denied,* 439 U.S. 552, (at issue was the distribution of Giddeon Bibles on school premises), and *Stein v. Oshinsky,* 348 F.2d 999 (2nd Cir. 1968) *cert. denied,* 382 U.S. 957, (student group here attempted to offer the identical grace at issue presently, but were denied by school authorities).

The teachers' acts are state action. Teachers are state employees. "Under Alabama law, teachers are appointed, suspended, and removed by the county school boards. See Ala. Code Section 16-8-23 (1927). The Alabama county school boards are creatures of the state and are controlled by the state. See Ala. Code Section 16-3-11 (1927); Ala. Code Section 16-8-8 (1927); (further citations omitted)." *Jaffree v. Wallace, supra* at 1533.

The board here ratified the teachers' prayer practices. Id. at 1534. Mr. Jaffree made several contacts with the school superintendent and complained about the teacher activities.[14] Additionally, on July 28, 1982, the Board adopted a resolution supporting the teacher prayer exercises.[15] On this record the Petitioners cannot be serious in asserting no state involvement.

Without resort to the tri-parte test articulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971)[16] the state sponsored

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[14]Tr. at 215-217.

[15]See Brief of Appellant before the Eleventh Circuit at 27 Note 16. During this meeting Petitioner Dan Alexander, in addressing the Board, made the following statement:

> (1) The Board must say the teachers are wrong; get out of this situation in the easiest way possible, and issue directives it shall never be done again; or
>
> (2) The Board must take the position the teachers were not wrong; the Board will support the teachers, will not put out any directives stopping prayer in the schools in the future, and the Board will also challenge the matter in court at whatever levels necessary.
>
> Id. at 5.

[16]The *Lemon* standard, as modified by the Eleventh Circuit in *American v. Rabun County Chamber of Commerce,* 678 F.2d 1379 (11th Cir. 1982), requires challenged acts of state officials to meet each of three criteria to satisfy the strictures of the Establishment Clause:

> (1) The *action* must have a secular purpose;
>
> (2) The principal or primary effect of the *action* must neither advance nor inhibit religion; and
>
> (3) The challenged *act* must not foster an excessive government entanglement with religion.
>
> 678 F.2d at 1389.

exercises at issue here would still fail to satisfy the strictures of the Establishment Clause. Having children bow their heads and recite the Lord's Prayer is unquestionably a religious exercise. *Murray, supra.* The other prayer exercises fair no better. Each are designed to give thanks to a celestial being for food. It cannot be gainsaid that these practices do not give preference to and advance theism over non-theism, thereby breaching the duty of strict neutrality. The Eleventh Circuit has recognized that "prayer is perhaps the quintessential religious practice". *Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. 1981) aff'd. 455 U.S. 913 (1982). By permitting prayer the state does not act neutral, it only furthers the interest of those religions that can benefit from its largess—ones willing to avow a belief in the existence of God, and use prayer as a means to that end. Even the district court acknowledged that had precedent been followed, the prayer exercises at issue here would be unconstitutional:

> (I)n this circuit, prayer in public schools is per se unconstitutional. . . . In sum, under present rulings the use of officially authorized prayers or Bible readings for motivational purposes constitutes a direct violation of the establishment clause.
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> *Jaffree v. Board of School Commissioners, supra* at 1112.

When applied, the prayer practices at issue here fails each part of the *Lemon* standard. That the purpose of these exercises was to instill in the children a belief in God is not in dispute.[17] Petitioners admit that the purpose of

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[17]During the trial, Petitioner Green was asked:

Q What was the purpose in saying this grace?

A The purpose is to instill something within the children.

Q What is that something?

A To be thankful.

these exercises were to advance religious beliefs.[18] Nor is it difficult to discern that the "principal or primary effect" has been to advance religion:[19]

> Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied. The primary effect of prayer is the advancement of ones religious beliefs. It acknowledges the existence of a Supreme Being. The involvement of the Mobile County school system in such activity involves the state in advancing the affairs of religion.
>
> *Jaffree v. Wallace,* 705 F.2d, 1534-35.

There can be little doubt that excessive entanglement is present here. An entanglement inquiry focus on the degree and quality of governmental interaction with religion. *Committee for Public Education v. Nyquist,* 413 U.S. 756, 794-97 (1973), *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971). This Court has recognized two types of entanglement. The first is administrative entanglement where governmental officials enter into close ongoing contact with the affairs of religious institutions. *Lemon, supra* at 615-20, *Meek v. Pittinger,* 421 U.S. 369. The second type of en-

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Q Thankful to who?

A Thankful to God.

Tr. at 179.

Other Petitioners expressed similar sectarian purposes for their religious exercises. See Tr. at 68, 70, 109-10, 133.

[18]See Petition for a Writ of Certiorari at 8.

[19]The direct effect of these exercises on the children is evident in Petitioner Boyd's testimony:

Q Did you continue to recite the graces throughout the school year?

A Yes.

Q How often was it recited?

A Before we went to lunch.

Q Everyday before going to lunch?

A Yes. Even if we forgot, somebody stopped and we had to say it.

Tr. at 111; See also Green's testimony. Tr. at 180; and Pixie Alexander's testimony. Tr. at 92.

tanglement focus on the potential for political divisiveness. *Lemon, supra* at 623.

The latter recognize that competition among religious sects for political and religious supremacy will occasion civil strife generated by competing efforts to gain or maintain support from the government. *Nyquist, supra,* at 796.

Respondents concede that there is little danger that the state sponsored prayer exercises at issue here will foster entanglement of the administrative type. However, the potential for political divisiveness is clear and present.

Petitioners have controlled the time, manner and types of prayers[20] which may be offered. The prayers are offered during the school day and on school facilities and at the suggestion of school officials. This alone is enough to establish excessive entanglement, but here, there is more. The filing of this lawsuit has resulted in the very civil strife that the Establishment Clause was designed to avoid. Mr. Jaffree and his counsel have been the targets of numerous threatening phone calls and letters. There was a flood of letters to the editor of the local daily criticizing Mr. Jaffree for bringing this suit. More than six hundred people joined as intervenors, in support of the school officials, asserting that their free exercise rights require state sponsored prayer in public schools.[21]

Further, the need to monitor individual teacher prayer practices gives rise to the very concerns expressed by this Court:

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[20]When viewed as showing preference to the Christian faith the teacher prayer exercises still fail to satisfy the requirements of the Establishment Clause because they are not justified by a compelling governmental interest, nor, is it shown that such exercises are "closely fitted to further that interest", (citation omitted). *Larson v. Valente,* U.S. , 102 S.Ct. 1673 (1982).

This interest is not satisfied by asserting the teachers' free exercise rights. The state is not required, in this instance, to provide a forum for the teachers to exercise their religion. See discussion on page 12 infra.

[21]R. at 252-57 and 424.

> (T)he very restrictions and surveillance necessary to ensure that teachers play a strictly non ideological role give rise to entanglements between church and state. *Lemon, supra,* at 620-21.

Petitioners argue "To deny a teacher the opportunity to voluntarily pray before going to lunch whether it be silent or verbal prayer is violating his or her constitutional rights under the free exercise clause."[22] This argument is disingenuous. Self initiated silent prayer can never be "silenced". While it is a closer question whether the "Free Exercise Clause" compells that a teacher be allowed to utter audible prayers in front of her class, there is no question that the Clause does not permit a teacher to lead her class in the chanting of these prayers.

> . . . A school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of religion. See L. Tribe Constitutional Law Section 14-8 (1978). See also *Abington School v. Schempp,* 347 U.S. at 223, 83 S.Ct. at 1572; *Brandon v. Board of Education of Guilderland Central School District,* 635 F.2d at 977. Here, there is no problem with students being foreclosed from practicing religion. The students attended school only several hours a day, five days a week, nine months during the year. The other hours are effectively open for their attendance at religious activities at places other than state supported schools.
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> *Lubbock Civ. Lib. Union v. Lubbock Ind. Sch. Dist.,* 669 F.2d 1038, 1048.

B. Petitioners' Second, Third and Fourth Questions Have Been Exhaustively Resolved by this Court.

Petitioners' second question for review is:

> Whether events prior to the adoption of the first amendment prove that it does not prohibit the defend-

[22]Petition for a Writ of Certiorari at 16.

ant school teachers from permitting voluntary prayer in the classroom.

Petitioners' third question for review is:

> Whether the fourteenth amendment incorporates the Establishment Clause of the first amendment against the state thereby prohibiting the defendant teachers from permitting voluntary prayer in the classroom.

Petitioners' fourth question for review is:

> Whether voluntary prayer in the classroom violates the Establishment Clause.

Respondents will discuss each of these arguments in tandem. This Court has considered and rejected Petitioners' argument concerning the scope of the Establishment Clause and its applicability to the state numerous times.[23] There is nothing new to review. Repetitive litigation serves neither the Court nor the public well.

The Eleventh Circuit discussed the two views concerning the interpretation of the Establishment Clause. The narrow view, argued by Petitioners, that the Clause only prevents the establishment of a national church and only applies to Congress. The broader view interprets the Clause as prohibiting any governmental support of religion by either the state or the several states. *Jaffree v. Wallace*, 705 F.2d 1530. The Circuit Court, unlike the District Court, followed this Court's broad interpretation of the Clause:

> (T)his Court has given the amendment a 'broad interpretation . . . in light of its history and the evils it was designed forever to suppress', *McGowan*, 366 U.S. at 441-42, 81 S.Ct. at 1113. . . . In *Engel v. Vitale*, the court meticulously re-examined the history surround-

[23] See *Everson v. Board of Education*, 330 U.S. 1 (1947); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *McGowan v. Maryland*, 366 U.S. 420 (1961); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); and, *Engel v. Vitale*, 370 U.S. 421 (1962).

ing the first and fourteenth amendments and reaffirmed its view.

Id. at 1531-32.

Finally, we come to the voluntariness of Petitioners' prayer practices. Nothing in the record indicates that these practices were voluntary. They were initiated by the teachers as part of their daily routine.[24] No parents' permission was solicited neither were parents informed of the existence of these practices.[25] Further, when informed of Respondents' objection, no steps were taken to excuse them from these exercises.[26] On this record these practices can hardly be considered voluntary.

Indeed, the Establishment Clause would lose all meaning if the state could set up a church or place of worship merely by asserting that membership is voluntary. For Establishment Clause purposes, the fact that participation in a religious program sponsored by the state is voluntary is irrelevant. Participation in the prayer programs reviewed by this Court in *Engel v. Vitale, supra, School District of Abington Township v. Schempp, supra, Chamberlain v. Dade County Board of Public Instruction,* 377 U.S. 402 (1964) and *Karen B. v. Treen, supra,* was also "voluntary" in the sense that students were not officially required to participate.

CONCLUSION

The issues presented in this petition are so utterly lacking in merit as to not justify any further extension of this Court's time. Accordingly, Respondents respectfully submit that the petition is due to be denied.

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[24]Tr. at 66, 108 and 179.
[25]Tr. at 66 and 67.
[26]Tr. at 116.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al., Petitioners,	•	
V.	•	NO. 83-804
ISHMAEL JAFFREE, et al., Respondents.	•	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI by mail this 21st day of February, 1984 to:

ROBERT C. CAMPBELL, III, ESQ.
ROBERT H. MUDD, JR., ESQ.
SINTZ, PIKE, CAMPBELL & DUKE
3763 PROFESSIONAL PARKWAY
MOBILE, ALABAMA 36609

THOMAS O. KOTOUC, ESQ.
THOMAS F. PARKER, IV, ESQ.
PARKER & KOTOUC
317 NORTH HULL STREET
MONTGOMERY, ALABAMA 36104

Attorney for Respondents